

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District  
Court for the Northern District of California,

*Petitioner,*

—v.—

LOUIS S. NELSON, Warden

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

## INDEX

	Page
Relevant Docket Entries .....	1
Respondent's Return to Order to Show Cause and Points and Authorities in Support thereof (excluding exhibits) .....	3
Petitioner Walker's Motions for Evidentiary Hearing and a Pre-trial Conference and Points and Authorities In Sup- port thereof .....	8
Order of the District Court for a Pre-trial Conference to Evidentiary Hearing .....	33
Petitioner Walker's First Interrogatories .....	34
Respondent's Objections to Petitioner Walker's First Inter- rogatories .....	36
Order of the District Court Denying Respondent's Objections to Petitioner's First Interrogatories .....	39
Opinion, U.S.C.A. for the Ninth Circuit, Hamley, Circuit Judge .....	40

**RELEVANT DOCKET ENTRIES IN THE PROCEEDINGS BELOW \***

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

Petition for Writ of Habeas Corpus, filed November 22, 1965

Order of the Court Directing the Respondent to Show Cause Why the Writ of Habeas Corpus Should Not Issue, filed November 22, 1965

Respondent's Return to Order to Show Cause and Points and Authorities in Support thereof (excluding exhibits), filed December 20, 1965 (A)

Petitioner Walker's Motions for Evidentiary Hearing and a Pre-trial Conference and Points and Authorities in Support thereof, filed August 5, 1966 (A)

Order of the District Court for a Pre-trial Conference to Evidentiary Hearing, entered August 16, 1966 (A)

Petitioner Walker's First Interrogatories, filed October 21, 1966 (R) (A)

Respondent's Objections to Petitioner Walker's First Interrogatories, filed October 21, 1966 (R) (A)

Order of the District Court Denying Respondent's Objections to Petitioner's First Interrogatories, entered October 21, 1966 (R) (A)

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

Application of Respondent (Petitioner Below) for Leave to File Petition for Writ of Mandamus and/or Prohibition, filed October 26, 1966 (R)

---

\* The symbols (R) and (A) indicate that the documents so designated are to be found in the Record and Appendix, respectively.



Order of the Court Directing Petitioner (Respondent Below) to Show Cause Why a Writ of Mandamus and/or Prohibition Should Not Issue, entered October 26, 1966 (R)

Respondent's (Petitioner Below) Petition for Writ of Mandamus and/or Prohibition and Points and Authorities in Support Thereof, filed October 26, 1966 (R)

Order of the Court Vacating the Order of the District Court Authorizing Interrogatories of Petitioner Walker, entered with Opinion May 10, 1967 (R) (A)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

No. 44385

ALFRED WALKER, PETITIONER

vs.

LAWRENCE E. WILSON, Warden, San Quentin State  
Prison, Tamal, California, et al., RESPONDENT

RETURN TO ORDER TO SHOW CAUSE—  
Filed December 20, 1965

Come now the People of the State of California and Lawrence E. Wilson, Warden of the California State Prison at San Quentin, and for a return to the order to show cause issued in the above-entitled matter and returnable on the 20th day of December, 1965, state:

I

That the petitioner, Alfred Walker, is properly confined in the California State Prison, San Quentin, California, pursuant to a judgment of the Superior Court, County of Alameda, No. 35252 in the records of that court, dated December 5, 1963, sentencing him to state prison for the term prescribed by law. A certified copy of that judgment is marked Exhibit A and is attached to and made a part of this return.

II

That petitioner appealed his conviction to the California District Court of Appeal, which court affirmed the judgment. A copy of the unpublished opinion in *People v. Walker*, 1/Crim. No. 4543, First District Court of Appeal, Division Two, October 15, 1964, is marked Exhibit B and is attached to and made a part of this return.

## III

That petitioner's allegation that his constitutional rights were violated by the search and seizure has no basis in fact or law.

## IV

That there is no factual support for petitioner's conclusory allegation that he was denied the right to confront witnesses against him in violation of the Sixth Amendment of the United States Constitution.

WHEREFORE, respondent prays that the Order to Show Cause be discharged, the petition denied, and the proceedings dismissed.

Dated: December 17, 1965.

THOMAS C. LYNCH  
Attorney General  
of the State of California

ROBERT R. GRANUCCI  
Deputy Attorney General

/s/ Charles W. Rumph  
Deputy Attorney General

## POINTS AND AUTHORITIES

## I

## THERE WAS NO ILLEGAL SEARCH AND SEIZURE

Petitioner is before this Court upon an allegation that the hotel manager unlocked his room and allowed police officers to enter, that the officers entered, arrested petitioner and searched the room without a warrant in vio-

lation of the Fourth and Fourteenth Amendments to the United States Constitution. Petition, p. 4. So far as it goes, this is an accurate summary of some of the facts in this case. However, the most significant facts, and the ones upon which the constitutional issue turns, have been omitted.

The case is a very simple one: an informant who had proven reliable in the past tipped off police that petitioner had five bags of marijuana for sale in Room 3 of the Dunbar Hotel (RT 8-9).<sup>1</sup> Police had had prior dealings with the informant and had obtained convictions from the information she had provided them previously (RT 8). The police gave her funds with which to purchase narcotics and told her to find out exactly where the cache of marijuana was located (RT 10). The officers at that time had no intent to charge a sale and did not, therefore, take the precautions required in a sale case of searching the informant and keeping her under observation and surveillance throughout the transaction (RT 11).

The informant went into the hotel and returned in a matter of a few minutes with a bag of marijuana (RT 10-11). She informed the officers that she had purchased it in the room from a man who was in bed, and that he had extracted the portion she bought from a larger bag secreted under the mattress (RT 14). The officers immediately went to the hotel room and sought entry (RT 14).

They first tried knocking at the door repeatedly and, when that failed to arouse the person they had reason to believe was in the room, they asked the hotel manager to let them in (RT 15). They had every reason to believe that petitioner was in the room since the informant had told them she completed the transaction just a matter of minutes earlier. The informant also had told them that the occupant of the room was in bed and the officers could reasonably assume that there was a possibility he had fallen asleep. This, of course, ultimately was the case (RT 15:25-16:1). ●

<sup>1</sup> Citations are to the Reporter's Transcript of the record on petitioner's appeal. A copy of that transcript will be lodged with the court.

The reasonableness of the search and seizure was raised at all stages, before, during and after trial. Moreover, it was briefed and argued thoroughly in the California District Court of Appeal.

Our position on appeal was based upon decisions of the California Supreme Court holding that probable cause to arrest can be based solely upon the information of a reliable informant. E.g., *People v. Prewitt*, 52 Cal.2d 330, 337 (1959). Upon facts virtually identical to those before this Court, the United States Supreme Court has held likewise in federal prosecutions. *Draper v. United States*, 358 U.S. 307, 312-13 (1959). See also *Jones v. United States*, 262 U.S. 257, 269 (1960). Since petitioner does not contest the scope of the search, and since in fact it was limited to the premises directly under petitioner's control, we submit that there was no violation of the Fourth Amendment to the United States Constitution, either under state or federal standards.

## II

### THERE WAS NO VIOLATION OF PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

No facts are stated in support of the conclusory allegation that petitioner was denied the right of confrontation by the failure of either the prosecution or defense to produce the informant to testify at trial. There is no allegation that the prosecution deliberately prevented the informer from being a witness, and even if there were such an allegation, there is absolutely no support in the record for such a proposition.

Moreover, petitioner does not allege that he or his attorney actively sought to call the informer as a witness, even though the police disclosed at all times the name of the informant and all information in their possession as to her whereabouts.

In any event, this issue is not properly before the Court in that there are no allegations of supportive facts to



substantiate the claim of denial of a constitutional right. The controlling law in such a case is best summarized by the following statement of a federal district judge:

"Merely culling language from federal and state authorities, as petitioner has done, will not satisfy the requirement that serious charges have some basis in fact. Petitioner is not entitled to a hearing on his belated accusations, unsupported by factual detail that he was 'forced' to plead guilty and that his lawyers practiced 'fraud' upon the court." *United States ex rel. Best v. Fay*, 239 F.Supp. 632, 634 (S.D. New York 1965). Cf. *United States ex rel. Homchak v. New York*, 323 F.2d 449, 450-51 (2d Cir. 1963).

#### CONCLUSION

For the reasons stated above, we submit that the Order to Show Cause should be discharged, the petition denied and the proceedings dismissed.

Dated: December 17, 1965.

THOMAS C. LYNCH  
Attorney General  
of the State of California

ROBERT R. GRANUCCI  
Deputy Attorney General

/s/ Charles W. Rumph  
Deputy Attorney General  
Attorneys for Respondent



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

Civil No. 44385

ALFRED WALKER, PETITIONER

-vs.-

LAWRENCE E. WILSON, Warden, San Quentin State  
Prison, Tamal, California, et al., RESPONDENTS

PETITIONER WALKER'S MOTIONS FOR (1) AN EVIDENTIARY  
HEARING; AND (2) A PRETRIAL CONFERENCE AND POINTS  
AND AUTHORITIES IN SUPPORT THEREOF—

Filed August 5, 1966

MOTIONS BEFORE THE COURT

Petitioner hereby moves the Court for an order requiring an evidentiary hearing pursuant to 28 U.S.C. § 2243 and the authority established in *Townsend v. Sain*, 372 U.S. 293 (1963).

As a second motion, petitioner hereby moves the Court for an order requiring a pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

The present motions and supporting memoranda are directed only to the necessity of an evidentiary hearing in order to resolve issues of fact concerning the unconstitutionality of petitioner's arrest and the search of his premises. Issues of law are not discussed in these papers except as they refer to and define relevant areas of factual inquiry.

## THE FACTS \*

On the morning of August 9, 1963; the petitioner, Alfred Walker, was given an automobile ride from San Francisco to Oakland, California, by the informer in this case, Miss Frances Jenkins. The petitioner had been in San Francisco attempting to obtain employment and, finding nothing certain, decided to seek employment from a friend in Oakland. (TT 84, 85)

After arriving in Oakland, petitioner desired to rent a hotel room in order to groom himself and get some sleep. Petitioner had not had proper sleep the night before and had taken a sleep-inducing tranquilizer known as Percodan. Upon the recommendation and with the assistance of Miss Jenkins, the petitioner obtained room number 3 at the Dunbar Hotel, 14th and West Streets, in Oakland. (TT 86-90)

Soon after entering his room with Miss Jenkins, petitioner decided to take a bath. Leaving Miss Jenkins alone in room 3, petitioner entered the hallway outside his room and proceeded to the bathroom nearby where he drew his bath water. He returned to his room several minutes later, whereupon Miss Jenkins left the room for the purpose of obtaining a bath towel for petitioner. Miss Jenkins did not, however, return within the next few minutes, so petitioner undressed himself, entered the bathroom, washed his underclothing, and bathed himself. He returned to his room immediately after his bath, dried himself with a hand towel, and placed his washed clothing on the radiators to dry. He immediately went to bed and to sleep. (TT 80-82)

At about this same time, Miss Jenkins went to a telephone to call the Oakland Police Department to report to one Sgt. T. Hilliard, that the petitioner allegedly possessed marijuana. Sgt. Hilliard, accompanied by another officer, Mr. Clyde Walker, then drove to the corner of 11th

---

\* The facts have been taken from testimony on record with the the Court. "PX" refers to pages from the transcript of the preliminary examinations; "TT" refers to pages from the transcript of the trial.

and West Streets, three blocks from the Dunbar Hotel, and met Miss Jenkins there. (PX 19, TT 9) At this point, Sgt. Hilliard got out of his undercover car and entered Miss Jenkins' car in order to discuss the information she claimed to have. (TT 9) Important parts of this discussion are presently in dispute and thus form part of the grounds for the present motions before the Court. Certain events occurred, however, which are not disputed.

While sitting in Miss Jenkins' automobile, Sgt. Hilliard allegedly gave her a \$20 bill and instructed her to purchase some marijuana from the occupant of room 3. (TT 10) Upon cross-examination, Sgt. Hilliard testified that the serial number of this bill was recorded, but was unable to say when it was recorded, or where it was recorded, or who recorded it. (PX 23) Nor were the records of this supposedly marked bill ever found despite a request by counsel and an order of the court. (PX 24) At no time during this meeting with Miss Jenkins did Sgt. Hilliard search her or have her searched by a matron or any other police official. Nor did Sgt. Hilliard or any other officer search Miss Jenkins car, her purse, or any of her effects to determine whether or not the informer possessed any marijuana or narcotics paraphernalia. (PX 22, 23) Sgt. Hilliard furthermore admitted that at the time he failed to take these procedures he had full knowledge of a long criminal record of the informer, including the use of narcotics. (TT 69) Sgt. Hilliard further admitted that for a number of years, including the "recent past," marijuana plants could be found growing in vacant lots in Oakland. (TT 73, 74)

Following their brief meeting, Sgt. Hilliard got out of the informer's car and entered his undercover car with Officer Walker. The informer, whose activities were unobserved within her car, then drove to the Dunbar Hotel. Sgt. Hilliard and Officer Walker followed the informer in their car to a point one block away from the hotel, at which point they parked. (TT 11) Miss Jenkins parked her car by the hotel, got out, and entered the building. Approximately 5 minutes later she emerged from the

hotel, entered her car, and drove unaccompanied to the corner of 11th and West Streets, 3 blocks from the hotel. (PX 14, 25, TT 12) Sgt. Hilliard also returned to this corner and again entered the informer's car. There Miss Jenkins gave the Sergeant a small bag of a vegetable substance which he identified as marijuana. (PX 14, TT 12) Miss Jenkins told Sgt. Hilliard that she had gone to room 3, petitioner's room, and purchased the bag with the supposedly marked \$20 bill. She gave a description of the petitioner and added that other marijuana was under his mattress. (PX 26, TT 14) According to Sgt. Hilliard, she also said that the petitioner intended to leave the hotel as quickly as he could, although the informer denies that she made any such statement. (PX 21, TT 15; declaration of Frances Jenkins, attached hereto.)

Sgt. Hilliard then dismissed the informer without questioning her story. He did not at this time follow orthodox procedures of searching the informer or having her searched in order to see whether or not she had on her person, in her purse, or in her car the \$20 bill which she supposedly used to purchase the marijuana, or whether she had marijuana or other narcotics paraphernalia. (PX 22) Nor did Sgt. Hilliard question circumstances of the informer's story, such as where she had met the suspect, (PX 26) where the suspect had obtained the marijuana, how he had obtained the marijuana, or how the informer had obtained her knowledge of it. (PX 27) Miss Jenkins left the corner and no longer participated in subsequent events.

On the information which he had been given, important aspects of which are presently disputed, Sgt. Hilliard immediately decided to enter the Dunbar Hotel in order to make an arrest of the suspect, the petitioner in this action. (TT 14) He did not seek to take action independent of the informer to corroborate or investigate the information which he had been given. He did not seek to obtain a search or arrest warrant, although it was 1:00 P.M. and the Courthouse was only a few blocks away. (TT 14) Sgt. Hilliard did, however, place Officer Walker in a position of surveillance where, because of the con-

figuration of the hotel, he was able to view the petitioner's room and all exits from the hotel. (PX 26)

Approximately 10 minutes after the informer had left the hotel where she allegedly made her purchase of marijuana, Sgt. Hilliard entered the hotel, proceeded to room 3, and knocked on the door with his clenched fist no fewer than approximately fifty times. (PX 36, TT 26) Despite his repeated knocking, Sgt. Hilliard failed to arouse the sleeping petitioner. He then prompted the manager of the hotel to open the door to petitioner's room.

Upon entering the room, Sgt. Hilliard discovered that the shades were drawn, the light was off, and petitioner was asleep in bed. At this point the Sergeant was again joined by Officer Walker. Using his flashlight, Sgt. Hilliard proceeded to the petitioner's bed and was able to awaken him only by physically shaking him three times. (PX 16; TT 15) At no time did the petitioner give Sgt. Hilliard consent to enter the room. (TT 26)

After waking the petitioner, Sgt. Hilliard saw needle scars on the petitioner's arm. The Sergeant arrested the petitioner for the use of Percodan and asked the petitioner if he had any narcotics equipment in the room. Petitioner answered that he did not but that the Sergeant had permission to look anyway. (TT 17) The Sergeant immediately lifted the mattress of petitioner's bed and discovered several bags of marijuana. He then searched the petitioner (who was nude), his clothing, his wallet, and the entire room. (PX 44) Despite this search, Sgt. Hilliard was unable to find the \$20 bill which the informer had allegedly used in order to purchase a bag of marijuana only minutes before. (TT 25)

Petitioner was subsequently tried for possession of narcotics for sale and, over his objection to the admission of evidence obtained through an illegal search, was convicted of the count. He is presently serving his term of 5 to 15 years in San Quentin Prison.



THE RECORD AND NEW EVIDENCE INDICATE  
THAT PETITIONER WAS UNCONSTITUTIONALLY  
ARRESTED AND HIS PREMISES UNCONSTITU-  
TIONALLY SEARCHED.

That there is a constitutional preference for arrests and searches only upon the issuance of warrants is clear. *Wong Sun v. U.S.*, 371 U.S. 471, 479, 480 (1963); *Johnson v. U.S.*, 333 U.S. 10, 14 (1948); *Beck v. Ohio*, 379 U.S. 89, 96 (1964). It is equally well settled that arrests and searches made without warrants can be constitutional only if made upon probable cause, and that probable cause in such cases can exist only in two narrowly defined instances:

- (1) When a *reliable* informer gives the arresting officer information which would "warrant a man of *reasonable caution*" to believe that a felony has been committed; *Carroll v. U.S.*, 267 U.S. 132, 162 (1924); *Beck v. Ohio*, *supra*, at 92; and
- (2) When an *unreliable* informer gives the acting officer information which would reasonably appear to create a "*pressing emergency*" requiring an arrest or search without a warrant. *People v. Cedeno*, 218 Cal. App.2d, 213, 230 (1963).

It is petitioner's firm opinion that neither of these standards were met in the present case.

A. *The arresting officer failed to take reasonable precautions necessary to establish probable cause for petitioner's arrest.*

The arresting officer received the *only* information on which he arrested petitioner from an informer whose reliability, as will be discussed below, was at best seriously in doubt. However, even assuming for the moment that the informer had a past record of sufficient reliability, the information obtained in the instant case was inherently unreliable since it was obtained through information-gathering activities which were not supervised or independently corroborated in any manner even though



it was clear that a serious risk of misinformation existed.

The facts speak for themselves. Acting on the information initially obtained from the informer by telephone—information in itself not sufficient to create probable cause—the police failed to corroborate or investigate this information with normal or reasonable precautions. Despite the fact that the informer was a known narcotics user and marijuana was readily available to her, she was not searched before she entered the hotel to make her alleged purchase. Nor was she searched either for narcotics or for the \$20 bill which she supposedly used to make her purchase. When the police entered petitioner's room and arrested him, however, they discovered him to be in a state of sound sleep and, despite a thorough search of the petitioner, his clothing, his wallet, and the entire room, failed to discover the \$20 bill which the petitioner allegedly had accepted only ten minutes before.

The totality of these facts conclusively indicates not only that the informer failed to make the alleged purchase of marijuana on which the police based their arrest, but that if the police had followed reasonable and normal precautions with the informer, they would have discovered significant irregularities in the informer's story; including the \$20 bill with which the informer claimed she had made her purchase. Such a discovery, of course, would have clearly discredited the reliability of the informer's information. Indeed, there is no doubt that the discovery of such an irregularity in the informer's story, or of any other irregularity which may have existed (such as the possession by the informer of marijuana), would have precluded the arresting officer from obtaining a warrant or from reasonably finding that there was probable cause for petitioner's arrest.

At the very least, the irregularities which petitioner contends should have been discovered upon normal search and questioning of the informer would have prompted the police to investigate or corroborate the informer's story independently before making an arrest. Yet the police failed to corroborate the informer's story with a single salient inquiry testing the informer's story either from her own mouth or from an independent source. The ef-

fect of the police's failure to search the informer, question her about the circumstances by which she knew the petitioner, or independently corroborate essential aspects of the petitioner's story, was merely to accept the informer's word without reason. The activities of the police added nothing to her story nor confirmed it in any way. They merely added insufficient information to what was originally insufficient information. "The quantification of the information does not necessarily improve its quality; the information does not rise above its doubtful source because there is more of it." *Ovall v. Superior Court*, 202 Cal.App.2d. 763, 21 Cal.Rptr. 387 (1962), Tobiner, J. In fact, Sgt. Hilliard's failure to employ reasonable precautions with the informer was less than the mere quantification of insufficient information since had he employed proper procedures he would have discovered the unreliability of the information before him. It is precisely for this reason that the constitution demands that reasonable precautions and investigations be made before the police may invade the privacy of a citizen or his home.

It is petitioner's contention that the police procedures were so basically defective that the writ of habeas corpus should be granted on the record as it stands. At the very least, however, a hearing should be held in order to consolidate the record by learning why proper procedures were not followed, and what the police would have learned and reasonably concluded had constitutional safeguards been employed.

B. *The informer's reliability was not established at the time of petitioner's arrest.*

It is petitioner's position that no matter how reliable the informer's past record was at the time of petitioner's arrest, the information in this case was inherently unacceptable as grounds for probable cause. But it is also clear that if the informer was not proven to be reliable at the time of the arrest, there could be no possibility that there was probable cause based, as it was, solely on information obtained from her. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Beck v. Ohio*, supra; *People v. Ceden*o,

supra. Recently obtained information, not heretofore presented to the Court, indicates that the reliability of the informer was indeed not established at the time of petitioner's arrest.

It should be noted at this point that the informer in this case was not available for examination at petitioner's preliminary hearing or trial. Nor was she available at any time for questioning by counsel for petitioner or by any court having jurisdiction over this case. Petitioner's trial attorney attempted to find and subpoena the informer before trial but was unable to do so and was successfully resisted in his efforts by the State Attorney. (PX 28-34) As a consequence, the issue of the informer's reliability was determined solely on the testimony of the arresting officer, Sgt. Hilliard. On June 8, 1966, however, counsel for petitioner interviewed the informer for the first time concerning her participation in the present case. (See Affidavit of J. Stanley Pottinger attached hereto) It is petitioner's belief that the absence of the informer from earlier proceedings in this case has led to material error which can be resolved only upon hearing.

On the issue of reliability, Sgt. Hilliard testified at the preliminary hearing that during a period of two years prior to the petitioner's arrest the informer had reliably given information which led to "at least" twenty arrests and convictions. (PX 20) Based on this particular testimony, the court expressly found that the informer was reliable and was not needed to appear in court on this issue.

"THE COURT: Well, let me take up your first motion as to the subpoenaing of the witness. My view is that the informant's role in this proceeding today was also to establish reasonable cause for the witness' entry and subsequent arrest and search—

"MR. HOOLEY: (Defendant's counsel) Well, it also supplied the—

"THE COURT: —after having given the identity (of the informant) and furnished the fact that he (Sergeant Hilliard) had twenty convictions based upon past disclosures, which would make her reliable,

*and the identity was disclosed. So that part is over."*  
(PX 47) (Emphasis supplied)

At petitioner's trial, however, on the question of reliability Sgt. Hilliard testified only to *two*—not twenty—occasions on which the informer had given the police reliable information which led to arrests. (TT 21, 22) In one of these two instances, the case of one Kilbourne York, the information obtained by the police led only to an arrest and no conviction. (Mr. York was arrested for illegal possession of narcotics but was released when it became known that he had a valid prescription for its use.) (TT 22) Thus, in the first of only two instances relied on to establish the informer's reliability, it appeared that the information given by Miss Jenkins, contrary to being reliable, turned out to be unreliable.

The one remaining instance relied upon by the police to establish the informer's reliability was a case of one Robert Gibson. (TT 21) Miss Jenkins, however, declares under penalty of perjury that she did not furnish the police with information in this case. (See Declaration of Frances Jenkins, Paragraph 5, and the Affidavit of J. Stanley Pottinger, Paragraph 7, attached hereto.) It should also be noted that under the same penalty the informer was of the opinion that the only occasion on which she furnished the police with information prior to petitioner's arrest was in the case of Kilbourne York, discussed above.

It is clear that the issue of the informer's reliability, without which there could have been no probable cause for petitioner's arrest, is very much in question if, indeed, it is not resolved on the record against the State.

*C. No "Pressing Emergency" Existed, Requiring An Arrest on the Basis of Unreliable Information.*

Assuming that the informer had not been proven reliable at the time of petitioner's arrest, the question arises as to whether or not there existed a "pressing emergency" which necessitated an immediate arrest and search without the safeguards of a warrant.



At the preliminary hearing and at trial, Sgt. Hilliard testified that there were two reasons in his opinion which necessitated an immediate arrest: (1) that the informer allegedly stated that petitioner wanted to sell the narcotics as fast as possible and return to San Francisco (PX 21, TT 15); and (2) that the Sergeant could not have readily obtained a warrant because it was during the lunch hour and "the judges in the municipal court were out to lunch." (TT 14, 15)

There is substantial evidence to be brought before the Court which indicates conclusively that neither reason testified to by Sgt. Hilliard could create probable cause for his warrantless entry into petitioner's room. Frances Jenkins, the informer, has declared under penalty of perjury that she did *not* inform the police that petitioner allegedly intended to leave his room quickly, or return to San Francisco, as she admittedly had no information concerning these matters. (See Declaration of Frances Jenkins, Paragraph 2, and Affidavit of J. Stanley Pottinger, Paragraph 4, attached hereto.) This evidence, in addition to other evidence in the record, places the question of emergency in direct dispute.

The second alleged reason given by Sgt. Hilliard—that all the judges were unavailable during lunch hour—may be disposed of summarily. Counsel for petitioner has learned from the Honorable William H. Brailsford, Judge of the Superior Court, Alameda County, that there are approximately twenty judges capable of issuing warrants from the Oakland Court House, and that considering normal absences, approximately twelve to fourteen judges are normally available throughout an average court day. The Judge further stated that not all of these judges are absent at any one time during the day, and that even those judges who are not in the Court House itself, but who are in the vicinity at a luncheon or elsewhere, are nonetheless prepared to review requests for warrants and take appropriate action. It was Judge Brailsford's opinion that failure to seek a warrant on the grounds that all judges were on their lunch hour could not be considered a good excuse. (See Affidavit of J. Stanley Pottinger, Paragraphs 10, 11, attached hereto.)

Counsel for petitioner also learned from the Honorable Winton McKibben, Judge of the Municipal Court, Oakland-Piedmont, that there are approximately four or five judges available to issue warrants throughout the normal court day and that one or two of the judges as a matter of course is on duty by 1:30 P. M., with the occasional exception that on Fridays (the day petitioner was arrested) the judges may extend their lunch hour to a time between 1:30 and 2:00 P. M. (See Affidavit of J. Stanley Pottinger, Paragraph 12, attached hereto.) Petitioner was arrested at approximately 1:00 P. M. The police would have lost no time, or at most, in Judge Brailsford's opinion, "negligible" time in seeking a warrant. Certainly the fundamental constitutional guarantees of which this petitioner has been deprived cannot depend upon such cavalier and inconsequential considerations as the remote possibility that a few minutes might be lost during a lunch hour. If such were the case, the constitutional requirement that warrants normally be sought could be dispensed with upon the slightest, most whimsical of excuses. The Constitution, we believe, demands more.

*D. The Trial Court Failed to Make Proper Findings on the Issue of Probable Cause.*

Following the presentation of evidence relating to the issue of probable cause for petitioner's arrest and the search of his room (TT 5-27), the trial court ruled for the State on this crucial issue with the single phrase as follows: "I think the officer acted reasonably and the search was legal." (TT 27) Such a finding, or rather lack of finding, is clearly inadequate. *Townsend v. Sain*, supra, at 313, 314; *Beck v. Ohio*, supra, at 92.\*

It is possible that the trial court made an implied finding on the issue of probable cause. After all evidence had

---

\* The present case is directly analogous to the *Beck* case, where the Supreme Court stated:

"The trial court made no findings of fact in this case. The trial judge simply made a conclusionary statement: 'A lawful arrest has been made, and this was a search incidental to that lawful arrest.'" (p. 92)



been presented on this issue, and immediately prior to the trial court's inadequate summary statement above, the court questioned the witness, Sergeant Hilliard, as follows:

(Examination of Sgt. Hilliard by Mr. Hooley, counsel for defendant)

"Q. August 9th? At no time was any consent given to you by Mr. Walker to enter that room?

"A. No, sir.

"Q. Your entry was based upon the information from Frances Jenkins with the assistance of the manager of the hotel, is that correct?

"A. Yes.

"Q. And solely upon the information from her and that assistance?

"A. Yes, that is true.

"MR. HOOLEY: Thank you. That is all.

"THE COURT: However, after you got in the room, did you tell him (the petitioner) you wanted to search the premises?

"THE WITNESS: Yes, I did, Your Honor. I asked him if I could search the premises looking for Percodan or any narcotic paraphernalia.

"THE COURT: And he said it was all right?

"THE WITNESS: He did, yes.

"THE COURT: Do you have any further questions, Mr. Mead? (State Attorney)

"MR. MEAD: No, Your Honor.

"THE COURT: All right. You can step down, Sergeant.

Is there any further evidence on the search and seizure point?

"MR. MEAD: No, we will submit upon this evidence.

"MR. HOOLEY: May I reserve, then, Your Honor, just the objection at the proper time in this case when Mr. Mead offers this into evidence, an objection based upon the testimony we have heard?

"THE COURT: Yes, you may, but my view is, Mr. Hooley, and I will inform you of it now, is that

I think the officer acted reasonably and the search was legal.

"MR. HOOLEY: Right. I—just to protect the record, if I may, Your Honor. I will object."

If an implied finding was made in this exchange, it could only be that the court believed that the petitioner's consent to a search for Percodan or narcotics paraphernalia was somehow a consent to the prior entry of his room, his arrest, and a search for marijuana. Such an implied finding, if indeed it was made at all, was neither supported by prior testimony in the record, nor could such a finding possibly be grounds for probable cause under appropriate legal standards. The police entered petitioner's room with the assistance of the hotel manager and nothing more. In fact, the petitioner was asleep at the time the police entered his room and was awakened only after the illegal entry took place. The Fourth Amendment's guarantee that persons shall be "secure in their persons [and] houses" begins at the doorway. Only with the consent of the citizen involved, a search warrant, or probable cause may an arresting officer enter the privacy of one's quarters. Consent to enter was admittedly not received (TT 26); a warrant was neither sought nor issued (TT 14); and probable cause, petitioner submits, did not exist. Entrance into petitioner's room, therefore, was unconstitutional at the point of entry, and subsequent activity by the police was consequently illegal. *Stoner v. California*, 376 U.S. 483, 488-490 (1964); *People v. Burke*, 208 Cal.App.2d 149, 160 (1962).

Furthermore, even if petitioner were capable *in law* of vitiating an illegal entry by giving a subsequent consent to the entry, *in fact* it is clear that no such consent was given in this case. According to the record, after the police entered the room they awakened petitioner from a sound sleep, *only then* saw scars on his arm indicating a recent use of Percodan, and *only then* arrested him for such use. There was clearly no probable cause for petitioner's arrest for use of Percodan *prior* to the illegal entry into the room, nor did the police base their entry into petitioner's room on any information regarding the

use of Percodan. (TT 25) The petitioner, having just been awakened, was questioned about his use of Percodan and, admitting such use, consented *only* to a search for that drug. Considering petitioner's drowsy condition, it is doubtful that he made an intelligent waiver of his constitutional rights even with regard to a limited search. Regardless of the validity of that limited consent, however, there can be no doubt that it was not in any way a consent to the entry of his room or to a search for marijuana of which the petitioner was unaware and of which the police in no way apprised him. *Stoner v. California*, 346 U.S. 483 (1964); *Channel v. U.S.*, 285 F.2d 217 (9th Cir., 1960); *Cipres v. U.S.*, 343 F.2d 95 (9th Cir., 1965).

It is evident that the trial court made no express finding on the question of probable cause. If the court made an implied finding, it is neither supported by the record nor by constitutional principles. In either case, the trial court committed material error which can be amended only upon a hearing.

### CONSTITUTIONAL AUTHORITY REQUIRES A HEARING TO RESOLVE THE ISSUES PRESENTED.

In *Townsend v. Sain*, 372 U.S. 293, 314 (1962), the Supreme Court established standards by which an evidentiary hearing is mandatory.

"We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

It is petitioner's opinion that the issues raised in the present case fall squarely within the standards set forth above.

1. *The Merits of the Factual Dispute Were Not Resolved in the State Hearing.*

As discussed under subletter D above, the trial court either failed to make a finding of fact or impliedly made findings of fact which were not supported by the record or which were judged by inapplicable constitutional standards.

"Reconstruction (of the trial court's findings) is not possible if it is unclear whether the State finder applied the correct constitutional standards in disposing of the claim. Under such circumstances, the district court cannot ascertain whether the State court found the law or the facts adversely to the petitioner's contention. Since the decision of the State trier of fact may rest upon the error of law rather than the adverse determination of the facts, a hearing is compelled to ascertain the facts."

Such is precisely the case here, where it is necessary to decide upon a hearing whether the court made any findings of fact, and if so, what they were; or, whether the court incorrectly assumed that a consent to a limited search after the police entered the room vitiated the illegal entry itself.

2. *The State Factual Determination is Not Fairly Supported by the Record as a Whole.*

Even if one assumes that a post-entry consent may, in certain cases, legitimize an otherwise illegal entry, such a finding in the present case (if such can be implied) is not supported by the record as a whole. As discussed under subletter D above, it is clear that the petitioner consented only to a limited search under circumstances of fear and drowsiness which clearly indicate that he could not have intelligently waived his right to the production of a warrant.

3. *The Fact Finding Procedure Employed By The State Court Was Not Adequate to Afford a Full and Fair Hearing.*

In light of the fact that the informer in this case, the sole source of information upon which probable cause was allegedly based, was never questioned concerning her participation in this case is, in petitioner's view, material error. In light of the material facts presently in dispute which arise from the informer's role in this case, her absence from all prior proceedings is "grave enough to deprive the State evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend." *Townsend v. Sain*, supra, at 316.

4. *There is a Substantial Allegation of Newly Discovered Evidence.*

As discussed under subletters A through D above, the informer's previously unquestioned and unknown version of her participation in this case raises material issues of fact which go to the very heart of her reliability and the probable cause for petitioner's arrest. (See Declaration of Frances Jenkins and Affidavit of J. Stanley Pottinger, attached hereto.

5. *The Material Facts Were Not Adequately Developed at the State Hearing.*

As discussed under subletter A above, it is apparent that the court at petitioner's preliminary hearing made a finding of probable cause based expressly on testimony that the informer had given reliable information leading to at least twenty arrests and convictions prior to petitioner's case. In light of the police testimony at trial and the informer's present version of the facts, both of which dispute the testimony of twenty arrests and convictions, it is evident that the court made its findings on facts not adequately developed at the hearing.



6. *Other Facts Indicate That the Trier of Fact Did Not Afford the Habeas Applicant a Full and Fair Fact Hearing.*

It should be evident both from the facts on record and from facts newly discovered, as discussed under subletters A through D above, that the procedures by which the police allegedly found probable cause for the petitioner's arrest were so defective and inadequate as to be constitutionally unsound. It is petitioner's further contention that had the informer been present at the hearing, and had the facts both as they are known on the record and as they are now alleged been presented to the court, the court could only have found that probable cause did not exist. Only upon a hearing can the questions presented in these papers be resolved and the facts relevant to these questions be found.

Petitioner therefore respectfully requests that the Court grant its motion for a hearing either according to the mandatory requirements of *Townsend v. Sain* or in the sound discretion of the Court.

A PRETRIAL CONFERENCE IS NECESSARY  
IN ORDER TO EXPEDITE A HEARING.

Should the Court grant petitioner's motion for a hearing, it is petitioner's opinion that a pretrial conference would greatly assist in simplifying and limiting the issues involved. There are potentially a great number of issues and related sub-issues which might be investigated in a hearing. Similarly, the number of witnesses who might be called at a hearing will vary depending upon the issues to be resolved. Petitioner believes that many of these issues may be clarified and the witnesses decided upon through discussions and stipulations between counsel. A pretrial conference will also assist the Court and counsel in determining the time necessary for an adequate hearing and will prevent the possibility of undue surprise.



Petitioner, therefore, respectfully requests that the Court grant its motion for a pretrial conference.

Dated: August 5, 1966.

Respectfully submitted,

BROAD, BUSTERUD & KHOURIE

/s/ J. Stanley Pottinger  
Attorneys for Petitioner

Receipt of the within Notice of Motions,  
Motions and Points and Authorities  
in Support Thereof is hereby acknowledged.

Dated: August ....., 1966.

THOMAS C. LYNCH  
Attorney General  
of the State of California  
6000 State Building  
San Francisco, California 94102

By .....

## DECLARATION

I, FRANCES JENKINS, declare the following:

1. On the morning of August 9, 1963, I gave a man, whose name was unknown to me, a ride in my car from San Francisco to Oakland, California. During that day this man obtained a room at the Dunbar Hotel, 14th and West Streets, in Oakland. While in the hotel room, I talked to this man about the possibility of "turning a trick" with him. It was not my intention to have any relations with this man at that time or later, however, and without having any such relations I left this man's room. Upon leaving I told him that I would "pick him up later," that is, return to the hotel at a later time for relations.

2. I then left the hotel and informed one Sargent Hilliard of the Oakland Police Department that the man in the hotel room was in the possession of marijuana. I did not tell the police this man's name as I did not know it. I also did not tell the police this man's home address, nor his occupation, nor whether the man had a criminal record, nor where he intended to go from the hotel, nor when he intended to leave the hotel, as I had no knowledge of these matters. I did give the police a description of the man, telling them that the man was Negro, short to medium in height, and had a mustache.

3. Sargent Hilliard met me shortly afterward near the Dunbar Hotel. He gave me a \$20 bill and told me to make a purchase of a bag of marijuana from the man I had described in the hotel room. Sargent Hilliard and I were sitting in a car at this time and neither he nor anyone else searched me, the car or any of my possessions.

4. I went into the hotel and remained there for approximately five minutes after which I came out of the hotel with a bag of marijuana. Upon leaving the hotel, I immediately met Sargent Hilliard at a nearby corner and gave him the bag of marijuana. I informed him that I had purchased it from the man in the hotel room whom I had described. Neither Sargent Hilliard nor anyone else searched me at this time. I then left the corner and

Sargent Hilliard and have never seen the man I described in the hotel room again.

5. I do not consider myself a paid professional informer. The police have not pressured me to give them information regularly. To the best of my recollection, I have given them information on criminal suspects only once before the occasion referred to above, and that was in the case of one Milbourne York. In the cases of Robert Gibson and R. D. Davis, I did not inform the police.

6. On June 8, 1966, in the presence of Mr. W. Hartley, Correctional Counselor, I related the above events to Mr. J. Stanley Pottinger, who represented himself to be an attorney for one Mr. Alfred Walker.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Frances Jenkins  
FRANCES JENKINS  
7-28-66

Place: Santa Rita

Date: 7-28-66

STATE OF CALIFORNIA )

) SS:

CITY AND COUNTY OF SAN FRANCISCO )

### AFFIDAVIT

I, J. STANLEY POTTINGER, being duly sworn, say as follows:

1. I am the attorney for the petitioner in the above action.

2. On June 3, 1966, I obtained permission from Iverne R. Carter, Superintendent of the California Institution for Women, Corona, California, through Mr. Robert Nel-

son, Correctional Counselor No. 3, and from Miss Frances Jenkins, the informer in this case, to interview the latter concerning her participation in petitioner's arrest. On June 8, 1966, in the presence of Mr. W. Hartley, Correctional Counselor No. 1, I interviewed Miss Jenkins in Corona, California.

3. Miss Jenkins stated to me that no other person had previously interviewed her or talked with her about petitioner's case or her participation in it. During the course of our interview, Miss Jenkins stated that she had given the petitioner a ride to Oakland from San Francisco on the morning of August 9, 1963, and had gone with him to the Dunbar Hotel to help him secure a room. She stated that when they entered the room, she had discussed briefly the possibility of "turning a trick" with the petitioner but that as far as Miss Jenkins knew, the petitioner had little or no money and she had no definite intention of having relations with him. Soon after entering the petitioner's hotel room, Miss Jenkins left it and told the petitioner that she would "pick him up later", that is, return to the hotel later for relations. The petitioner at this time was wearing shoes, socks, pants and a T-shirt or similar shirt.

Upon leaving the hotel, the informer called one Sgt. Hilliard of the Oakland Police Department and told him that petitioner was in a room at the Dunbar Hotel and was in the possession of marijuana. Neither at this time nor at any later time did Miss Jenkins tell the police the petitioner's name, his address, his occupation, whether or not he had a criminal record, where he intended to go from the hotel, or when he intended to leave the hotel, as she had no knowledge of these matters. She gave the police a description of the petitioner, telling them that he was Negro, short to medium in height, and had a moustache.

5. Miss Jenkins then met Sgt. Hilliard shortly after her phone call at a corner near the Dunbar Hotel. Miss Jenkins said that Sgt. Hilliard gave her a \$20 bill and instructed her to purchase a bag of marijuana from the man she had described in the hotel room. At no time did Miss Jenkins see Sgt. Hilliard mark or record the bill.

Miss Jenkins and Sgt. Hilliard were at this time sitting in a car. At no time did Sgt. Hilliard search Miss Jenkins or her car.

6. Miss Jenkins went immediately into the hotel and remained there for approximately five minutes. She then emerged from the hotel and met Sgt. Hilliard at a nearby corner. She next gave him a bag of marijuana which she said she had purchased from the man she had described in the hotel room, the petitioner. Neither Sgt. Hilliard nor anyone else searched the informer at this time. Miss Jenkins then left the corner and was not concerned with the petitioner or her participation in his arrest at any time thereafter.

7. I questioned Miss Jenkins about her status as an informer prior to petitioner's arrest. She said that the police had not pressured her for information and that she did not believe she had given the police information on criminal suspects prior to petitioner's case except in the case of one Kilbourne York. She also stated that in the case of a Robert Gibson and R. D. or Curly Davis, she did not give information to the police. She stated that she was not sure who did give information to the police in the Gibson case but that it might have been an acquaintance of hers known as Frank Hightower. She was unable to say for sure as she could not recall or did not know the circumstances of the Gibson case or who was involved in it.

8. I informed Miss Jenkins that she might be needed to testify to the events she related to me at a hearing for the petitioner. She stated, and Mr. Hartley confirmed, that she would probably be paroled in the month of July, 1966, and would return to her home in Oakland, California. She said that she would be available for testimony at any time after parole and could be found through her parole agent, Miss Carolyn Turner, of the San Francisco District Office, Parole and Community Services Division.

9. On July 28, 1966, I learned that Miss Jenkins was being held at the Rehabilitation Center at Santa Rita, California. I interviewed Miss Jenkins there and obtained



from her the attached Declaration under Penalty of Perjury confirming the events of which she spoke in our earlier interview, as stated above.

10. On August 1, 1966, I talked by telephone with the Honorable William H. Brailsford, Judge of the Superior Court, County of Alameda, California. I informed Judge Brailsford that I represent the petitioner in this action and that he had been arrested and his room searched without a warrant in the jurisdiction of Alameda County. I informed the Judge that one of the alleged reasons for the police's failure to seek a warrant was that the arrest and search took place at approximately 1:00 P. M. and that therefore all of the judges were presumably out to lunch. I requested that Judge Brailsford inform me on the availability of judges for the purpose of issuing warrants and to appraise the validity of the police's excuse for not seeking a warrant.

11. Judge Brailsford informed me that there are approximately twenty judges capable of issuing warrants from the Oakland Court House. He stated that accounting for vacations, illnesses and other absences, approximately twelve to fourteen judges are normally available throughout an average court day. He stated that not all of these judges are absent at any one time during the day and that even those judges who are not in the Court House proper, but who are in the vicinity at a luncheon or elsewhere, are nonetheless prepared to review requests for warrants and take appropriate action. It was Judge Brailsford's opinion that failure to seek a warrant on the grounds that the judges were gone on their lunch hour could not be considered a good excuse.

12. On August 3, 1966, I talked by telephone with the Honorable Winton McKibben, Judge of the Municipal Court, Oakland-Piedmont, California, concerning the matters discussed above. Judge McKibben informed me that there are approximately nine municipal court judges, four or five of whom are available during the normal court day to review and issue warrants. He stated that there is no certainty that all judges would be gone during a normal lunch hour or that any would be in chambers during this period. He stated that in any event, there

are always one or two judges at the Court House by 1:30 P. M. on every day except Friday, at which time the judges occasionally extend their lunch hour close to 2:00 P. M. On Fridays, as on every other day, there are always four or five judges available in the Court by 2:00 P. M.

13. It was Judge McKibben's opinion that in any case, the time during which no judge in his particular court would be available to review a warrant would be "negligible", and that this would be particularly so if the petitioner were arrested at approximately 1:00 P. M.

---

J. STANLEY POTTINGER

SUBSCRIBED AND SWORN TO  
before me this 4th day of  
August, 1966.

---

Notary Public  
Principal Office: San Francisco

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

No. Civil 44385

ALFRED WALKER

vs.

LAWRENCE E. WILSON

NOTICE

TO J. Stanley Pottinger, Esq.  
Attorney at Law  
c/o Broad, Busterud & Khourie  
Russ Building  
San Francisco, California

Derald Granberg, Esq.  
Deputy Attorney General  
6000 State Building  
San Francisco, California

YOU ARE HEREBY NOTIFIED that on August 15, 1966 JUDGE GEORGE B. HARRIS, ordered the above entitled case set for pre-trial conference September 1, 1966, 10:00 a.m.

JAMES P. WELSH  
Clerk, U. S. District Court

By, PETER C. GRACE  
Deputy Clerk

Received, Aug. 16, 1966

San Francisco, California  
August 16, 1966

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 44385

ALFRED WALKER, PETITIONER

—vs—

LAWRENCE E. WILSON, RESPONDENT

PETITIONER'S FIRST INTERROGATORIES—

Filed October 21, 1966

Petitioner requests that respondent answer under oath, in writing, in accordance with Rules 33 and 81(a)(2) of the Federal Rules of Civil Procedure, each of the interrogatories set forth herein.

INTERROGATORIES

*Interrogatory No. 1:*

Prior to August 9, 1963, did Sgt. T. Hilliard of the Oakland Police Department arrest or search the premises of any person(s) on the basis of information supplied to him by Frances Jenkins (alias Frances Grisby)?

*Interrogatory No. 2:*

If the answer to Interrogatory No. 1 is "yes", for each occasion on which such an arrest or search was made:

- (a) Name the person arrested or whose premises were searched;
- (b) Give the date of arrest or search;
- (c) Name the offense for which the arrest or search was made;
- (d) Answer "yes" if the arrest or search was made upon the issuance of a warrant;
- (e) State the disposition of the person arrested (e.g., released before complaint issued; released without arraignment; released after preliminary hearing; pleaded "guilty"; pleaded "innocent" and was tried; conviction or no conviction resulted; etc.);

- (f) Answer "yes" if the arrest or search was made upon information supplied in part by any person(s) *in addition to* Francis Jenkins. If the answer is "yes", state whether such person(s) supplying additional information was/were:
- (i) informant(s) who had given information to Sgt. Hilliard prior to August 9, 1963;
  - (ii) informant(s) whose prior information was reliable;
  - (iii) informant(s) considered to be special agents of the Oakland Police Département;
  - (iv) Police officer(s);
  - (v) other (describe).

*Interrogatory No. 3:*

Prior to August 9, 1963, did Frances Jenkins at any time give Sgt. Hilliard information concerning an alleged violation of law by any person, which information Sgt. Hilliard

- (a) Did not consider *reliable*, or
- (b) Did not consider *sufficient* (whether considered reliable or not) to make an arrest or search without a warrant?

*Interrogatory No. 4:*

If the answer to Interrogatory No. 3 is "yes", for *each occasion* on which such information was given:

- (a) State whether the arrest or search was not made for the reasons given in Interrogatory No. 3(a) or 3(b), or both;
- (b) Give the approximate date on which such information was given.

DATED: October 20, 1966.

J. STANLEY POTTINGER  
J. STANLEY POTTINGER  
Attorney for Petitioner



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 44385

ALFRED WALKER, PETITIONER

vs.

LAWRENCE E. WILSON, Warden, San Quentin State  
Prison, Tamal, California, et al., RESPONDENT

OBJECTIONS TO PETITIONER'S INTERROGATORIES—  
Filed October 21, 1966

Respondent objects to the interrogatories served on respondent on the 20th day of October, 1966, upon the grounds stated:

1. That said interrogatories are not authorized in federal habeas corpus proceedings.

With reference to the applicability of the Federal Rules of Civil Procedure to habeas corpus proceedings, Rule 81(a) (2) provides:

"In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in . . . habeas corpus . . . ."

The statutory provisions for interrogatories in habeas corpus proceedings are restricted to those set forth in 28 U.S.C. section 2246, which provides:

"On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

Certainly the above statute does not contemplate the use of civil discovery procedures in habeas corpus proceedings. The depositions referred to are those intended as testimonial evidence at a hearing upon the habeas corpus application; the interrogatories referred to are permissible only if affidavits are used for the purpose of proof and then may be directed only to an affiant. *Sullivan v. United States*, 198 F.Supp. 624, 626 (S.D.N.Y. 1961). In *Sullivan*, the court, in a proceeding under 28 U.S.C. section 2255 which is analogous to habeas corpus proceedings, refused to permit the use of interrogatories propounded pursuant to Rule 33, stating:

"While cases may be found in which certain of the Rules of Civil Procedures were said to apply to this type proceeding no reported case has been brought to our attention wherein the civil discovery practice, so traditionally alien to criminal procedure, has been held generally applicable to these proceedings which have their roots in criminal cases, and which result, if petitioner succeeds, ordinarily, in a new criminal trial.

"Just because some decisions referred to § 2255 as a 'civil proceeding' does not prevent further inquiry. To us the loose use of the phrase 'civil proceeding' begs the question. It is somewhat similar to Mr. Justice Frankfurter's criticism of the phrase 'assumption of risk' in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 68, 63 S.Ct. 444, 452, 87 L.Ed. 610. To adapt his language to the present contexts, 'The phrase "civil proceeding" is an excellent illustration of the extent to which uncritical use of words bedevils the law.' If this really was a civil proceeding we would suppose that all of the civil rules would be applicable including the rules encompassing the government's right to take the deposition of an adverse party, and formal pretrials, and the right to a jury, *ad infinitum*.

"In our opinion, interrogatories are available to a prisoner in proceedings of this nature only to the limited extent for which statutory provision is made

as indicated [28 U.S.C. § 2246] and, therefore, we find that the general objection of the government is well taken and should be sustained." (Footnotes omitted.) 198 F.Supp. at 626-627.

Our research has produced no reported cases in which interrogatories to parties have been authorized in federal habeas corpus proceedings for discovery purposes. Since the Federal Rules of Civil Procedure relating to civil discovery have no applicability to criminal matters, it would be incongruous to sanction their use prior to an evidentiary hearing in a habeas corpus proceeding which is quasi-criminal in nature. *Sullivan v. United States, supra*, 626.

Dated: October 21, 1966

THOMAS C. LYNCH  
Attorney General of California

ALBERT W. HARRIS, JR.  
Assistant Attorney General

DERALD E. GRANBERG  
Deputy Attorney General  
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 44385

ALFRED WALKER, PETITIONER

-vs-

LAWRENCE E. WILSON, RESPONDENT

ORDER DENYING RESPONDENT'S OBJECTIONS TO  
PETITIONER'S FIRST INTERROGATORIES—

October 21, 1966

The respondent's objections to petitioner's first interrogatories, having come on for hearing this day, and the Court being fully advised,

IT IS ORDERED that respondent's objections are denied, and that respondent shall answer said interrogatories on or before October 26, 1966.

DATED: Oct. 21, 1966

GEORGE B. HARRIS  
GEORGE B. HARRIS  
Chief Judge  
United States District Court

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 21,365

LAWRENCE E. WILSON, Warden California State Prison,  
San Quentin, California; PETITIONER

vs.

THE HONORABLE GEORGE B. HARRIS, Judge of the United  
States District Court for the Northern District of  
California, RESPONDENT

Original Proceeding in the Nature of Mandamus or  
Prohibition

OPINION—May 10, 1967

Before: HAMLEY, MERRILL and KOELSCH, Circuit  
Judges

HAMLEY, Circuit Judge:

In this original proceeding for a writ in the nature of mandamus or prohibition, questions are presented concerning the right of an applicant for a federal writ of habeas corpus to propound written interrogatories in aid of his application.

The related habeas corpus proceeding was commenced by Alfred Walker in the United States District Court for the Northern District of California. *Walker v. Wilson*, Docket No. 44385. He is an inmate at California State Prison, San Quentin, California, under a judgment of conviction, and sentence, for illegal possession of marihuana. The marihuana was found in his hotel room. In his habeas corpus application, Walker alleged that the marihuana was obtained as a result of an unlawful search and seizure and that his rights under the Due Process Clause of the Fourteenth Amendment were therefore violated.

In an effort to discover evidence which would be helpful to Walker in this habeas corpus proceeding, Walker's court-appointed counsel served upon counsel for the



warden a set of four written interrogatories, purportedly pursuant to Rule 33, Federal Rules of Civil Procedure. Walker's counsel directed these interrogatories to the warden. The interrogatories, intended for discovery purposes, were designed to disclose the reliability of the informant, Frances Jenkins, upon whom Sgt. T. Hilliard had relied in making the warrantless arrest of Walker, incident to which Sgt. Hilliard made the search and seizure.

In particular, the warden was called upon to state whether, prior to the time of Walker's arrest, Sgt. Hilliard had made any other arrests or searches upon the basis of information supplied by Frances Jenkins. If the answer to this question was affirmative, the warden was asked to give the particulars as to each such prior arrest or search, including the disposition of the case.<sup>1</sup>

Counsel for the warden objected upon the ground that discovery interrogatories are not authorized in federal habeas proceedings. The district court overruled the objection and ordered the warden to answer the interrogatories. The warden then instituted this proceeding in the nature of mandamus or prohibition to have the district court order set aside or its enforcement restrained.

Rule 33, upon which Walker relied in serving the interrogatories, authorizes the propounding of written interrogatories to a party to the action. Rule 26, Federal Rules of Civil Procedure, pertains to the taking of the testimony of any person by deposition, which deposition may be upon oral examination or written interrogatories. Information obtained under either rule may be used as evidence at a trial to the extent provided in Rule 26(d), or for discovery purposes.

The warden contends, however, that in view of Rule 81(a) (2) of the Federal Rules of Civil Procedure, quoted

---

<sup>1</sup> The interrogatories also required the warden to indicate whether, as to any such prior arrests or searches, Sgt. Hilliard relied in part upon any information in addition to that supplied by Frances Jenkins giving particulars. The warden was also called upon to give details of any instances, if any, in which Sgt. Hilliard received information from Frances Jenkins which Sgt. Hilliard did not consider adequate or sufficiently reliable to support a warrantless arrest.

in the margin,<sup>2</sup> Rules 26 and 33 do not provide authority for utilization of discovery interrogatories in habeas proceedings.

Rule 81(a) (2) pertains to, and in general limits the application of, the Federal Rules of Civil Procedure with respect to certain enumerated special proceedings, including habeas corpus. Concerning the particular problem which confronts us here, we construe Rule 81(a) (2) to provide as follows: The Federal Rules of Civil Procedure relating to discovery interrogatories are applicable in habeas proceedings provided both of the following conditions are satisfied: (1) discovery interrogatories in habeas proceedings are not otherwise provided for in statutes of the United States, and (2) the discovery practice in habeas proceedings, prior to the effective date of the Federal Rules of Civil Procedure, conformed to the then discovery practice in actions at law or suits in equity.

The warden contends that neither of these conditions is present and that Rule 81(a) (2) therefore precludes the application of Rules 26 and 33 in habeas proceedings.

Concerning the second condition, the warden argues that, prior to September 16, 1938, when the Federal Rules of Civil Procedure became effective, discovery was not available in federal habeas proceedings. In response to this contention Walker is unable to point to any instance in which discovery procedure was used in habeas proceedings prior to September 16, 1938. Nor has our research disclosed any such practice.

Walker argues, however, that habeas proceedings are civil in nature and contends that since, prior to September 16, 1938, discovery practice was available in civil proceedings in general, it must be assumed that discovery was

<sup>2</sup> Rule 81(a) (2) reads:

"(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, and quo warranto. The requirements of Title 28, U.S.C. § 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force."

available in habeas proceedings. We do not believe that the second condition of Rule 81(a)(2) can be satisfied on such a theoretical basis. In our view, that condition is met only if it can be shown that, prior to September 16, 1938, discovery was actually being used in habeas proceedings, and that such use conformed to the then discovery practice in actions at law or suits in equity. No such showing has been made.

We therefore conclude that, by reason of the failure to satisfy the second condition of Rule 81(a)(2), the discovery-interrogatory procedure of Rules 26 and 33 is not available in habeas proceedings.<sup>3</sup>

Although not specifically raised by respondent, the question remains whether, independent of the Rules, some statute of the United States authorizes discovery interrogatories in habeas proceedings. The only statute which seems to have any relevancy is 28 U.S.C. § 2246 (1964), quoted in the margin.<sup>4</sup>

The first sentence of section 2246 authorizes depositions in habeas proceedings. It is reasonable to assume that Congress meant "depositions" to include written interrogatories as well as oral examination, since that term is so used in Rule 26, which had been in effect for ten years when section 2246 was enacted on June 25, 1948. However, this sentence of section 2246 clearly indicates that the depositions therein authorized may be used only for the purpose of obtaining "evidence," and not for general discovery purposes.<sup>5</sup>

<sup>3</sup> In view of this holding it is unnecessary for us to decide whether the first condition of Rule 81(a)(2), noted previously in the text of this opinion, is satisfied with respect to discovery interrogatories in habeas proceedings.

<sup>4</sup> Section 2246 reads:

§ 2246. Evidence; depositions; affidavits

"On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

<sup>5</sup> Under this analysis, section 2246 is available to Walker for the purpose of obtaining evidence by the use of depositions obtained

The second sentence of section 2246 does not purport to authorize discovery interrogatories in habeas proceedings. That sentence pertains only to interrogatories designed to produce evidence admissible at the habeas hearing, and then only in response to affidavits which are admitted in evidence.

We therefore conclude that neither 28 U.S.C. § 2246, nor the Federal Rules of Civil Procedure, considered separately or together, authorize the propounding of discovery interrogatories in habeas proceedings.

The order authorizing the interrogatories directed to the warden is vacated.

on oral testimony or written interrogatories. But on the specific question Walker seeks to raise in his habeas proceeding—the reliability of the informant relied upon by the arresting officer—the warden could not give admissible evidence because any knowledge he would have on this matter would be hearsay. It should also be noted that the authority provided by section 2246 for the taking of depositions in habeas proceedings for evidentiary purposes, is as available to the warden as to the appellant for a writ.

Office-Supreme Court, U.S.  
FILED

AUG 26 1968

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS,

*Petitioner,*

—v.—

LOUIS NELSON,

*Respondent.*

**BRIEF AMICI CURIAE OF THE N.A.A.C.P. LEGAL  
DEFENSE AND EDUCATIONAL FUND, INC.,  
AND THE NATIONAL OFFICE FOR THE  
RIGHTS OF THE INDIGENT**

JACK GREENBERG

JAMES M. NABRIT, III

MICHAEL MELTSNER

JACK HIMMELSTEIN

10 Columbus Circle

New York, New York 10019

ANTHONY G. AMSTERDAM

3400 Chestnut Street

Philadelphia, Pa. 19104

*Attorneys for the N.A.A.C.P.  
Legal Defense and Educational  
Fund, Inc., and the National  
Office for the Rights of the  
Indigent*



## TABLE OF CONTENTS

	PAGE
Statement of Interest of the <i>Amici</i> .....	1
ARGUMENT—	
Introduction and Summary .....	3
I. The Federal Habeas Corpus Jurisdiction Should Be Administered by Modern, Efficient and Evolving Procedures Which Effectuate Its Purpose—the Vindication of the Right Against Unconstitutional Restraint .....	5
II. Rule 81(a)(2) Makes the Federal Rules of Civil Procedure Applicable in Habeas Corpus Except When a Statute Governs or When a Distinct, Traditional Practice of Habeas Pro- cedure Variant From the Procedure inordi- nary Civil Actions Manifests Unique Charac- teristics of the Writ That Make the Rules Unserviceable. In Any Event, Federal Trial Courts Are Empowered to Adopt the Proce- dures Described in the Rules as a Consequence of Their Undeniable Power to Formulate Ade- quate Procedures for the Administration of the Habeas Corpus Jurisdiction .....	23
CONCLUSION .....	33

## TABLE OF AUTHORITIES

Cases:	PAGE
Abel v. Tinsley, 338 F.2d 514 (10th Cir. 1964) .....	26
Adderly v. Wainwright, 272 F. Supp. 530 (M.D. Fla. 1967) .....	31
Bowdidge v. Lehman, 252 F.2d 366 (6th Cir. 1958) .....	26, 27
Bowen v. Boles, 258 F. Supp. 111 (N.D. W. Va. 1966) ....	26
Bowen v. Johnston, 306 U.S. 19 (1939) .....	34
Brown v. Allen, 344 U.S. 443 (1953) .....	6, 28
Bruner v. United States, 343 U.S. 112 (1952) .....	8
Carafas v. LaVallee, 391 U.S. 234 (1968) .....	5
Coleman v. Alabama, 377 U.S. 129 (1964) .....	34
Commonwealth ex rel. Herman v. Claudy, 350 U.S. 116 (1956) .....	34
Copenhaver v. Bennett, 355 F.2d 417 (8th Cir. 1966) ....	14
Darr v. Burford, 339 U.S. 200 (1950) .....	30
Dodd v. United States, 321 F.2d 240 (9th Cir. 1963) ....	14
Dorsey v. Gill, 148 F.2d 857 (D.C. Cir. 1945) .....	32
Duncan v. Louisiana, 391 U.S. 145 (1968) .....	5
Ex parte Bain, 121 U.S. 1 (1887) .....	6
Ex parte Bigelow, 113 U.S. 328 (1885) .....	6
Ex parte Bollman, 4 Cranch 75 (1807) .....	33
Ex parte Clark, 100 U.S. 399 (1879) .....	31
Ex parte Collett, 337 U.S. 55 (1949) .....	8
Ex parte Collins, 154 Fed. 980 (C.C. N.D. Cal. 1907), aff'd, 214 U.S. 113 (1909) .....	32
Ex parte Hawk, 321 U.S. 114 (1944) .....	6
Ex parte Lange, 18 Wall. 163 (1873) .....	6
Ex parte Mitsuye Endo, 323 U.S. 285 (1944) .....	31
Ex parte Parks, 93 U.S. 18 (1876) .....	6

Ex parte Siebold, 100 U.S. 371 (1879) .....	6
Ex parte Watkins, 3 Pet. 193 (1830) .....	6, 32
Fay v. Noia, 372 U.S. 391 (1963) .....	6, 11, 30, 34
Fortner v. Balkcom, 380 F.2d 816 (5th Cir. 1967) .....	22, 27
Frank v. Mangum, 237 U.S. 309 (1915) .....	6, 7
Frisbie v. Collins, 342 U.S. 519 (1952) .....	30
Georgia v. Rachel, 384 U.S. 780 (1966) .....	9
Gideon v. Wainwright, 372 U.S. 335 (1963) .....	5
Hamilton v. Hunter, 65 F. Supp. 319 (D. Kan. 1946) .....	26
Hardison v. Dunbar, 256 F. Supp. 412 (N.D. Calif. 1966) .....	32
Hickman v. Taylor, 329 U.S. 495 (1947) .....	12
Hill v. Nelson, 272 F. Supp. 790 (N.D. Cal. 1967) .....	32
Hill v. Nelson, N.D. Cal., No. 47318, unreported order of Chief Judge Harris, February 5, 1968 .....	32
Holiday v. Johnston, 313 U.S. 342 (1941) .....	24
In re Burwell, 350 U.S. 521 (1956) .....	31
In re McShane's Petition, 235 F. Supp. 262 (N.D. Miss. 1964) .....	26
In re Snow, 120 U.S. 274 (1887) .....	6
In re Wood, 140 U.S. 278 (1891) .....	6
Jones v. Cunningham, 371 U.S. 236 (1963) .....	5, 12, 29
Johnson v. Zerbst, 304 U.S. 458 (1938) .....	6, 10
Johnston v. Marsh, 227 F.2d 528 (3d Cir. 1955) .....	31
Knowles v. Gladden, 254 F. Supp. 643 (D. Ore. 1965) .....	27
Lyles v. Beto, 32 F.R.D. 248 (S.D. Tex. 1963) .....	26

Mapp v. Ohio, 367 U.S. 643 (1961) .....	5
McGarrah v. Dutton, 381 F.2d 161 (5th Cir. 1967) ....	26
Medley, Petitioner, 134 U.S. 160 (1890) .....	6
Miller v. Pate, 386 U.S. 1 (1967) .....	5
Miranda v. Arizona, 384 U.S. 436 (1966) .....	5
Molignaro v. Dutton, 373 F.2d 729 (5th Cir. 1967) ....	27
Moore v. Dempsey, 261 U.S. 86 (1923) .....	7
Pate v. Robinson, 383 U.S. 375 (1966) .....	5
Peyton v. Rowe, 391 U.S. 54 (1968) .....	5, 12, 15, 30
Pointer v. Texas, 380 U.S. 400 (1965) .....	5
Price v. Johnston, 334 U.S. 266 (1948) .....	30
Rodgers v. Bennett, 320 F.2d 83 (8th Cir. 1963) ....	14, 27
Russell v. United States, 321 F.2d 533 (9th Cir. 1963) ..	14
Sanders v. United States, 373 U.S. 1 (1963) .....	14, 30, 34
Sheppard v. Maxwell, 384 U.S. 333 (1966) .....	5
Sisquoc Ranch Co. v. Roth, 153 F.2d 437 (9th Cir. 1946)	31
Smith v. Bennett, 365 U.S. 708 (1961) .....	34
Specht v. Patterson, 386 U.S. 605 (1967) .....	5
Sullivan v. United States, 198 F. Supp. 624 (S.D. N.Y. 1961) .....	32
Thomas v. Duffy, 191 F.2d 360 (Denman, C.J. 1951) ....	31
Thomas v. Teets, 205 F.2d 236 (9th Cir. 1953) .....	31
Townsend v. Sain, 372 U.S. 293 (1963) .....	6, 7, 13, 29, 30
United States ex rel. Bruno v. Herold, 39 F.R.D. 570 (N.D. N.Y. 1966) .....	26
United States ex rel. Goldsby v. Harpole, 249 F.2d 417 (5th Cir. 1957) .....	32

United States ex rel. Jelle v. United States, 106 F.2d 14 (1939) .....	32
United States ex rel. Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962) .....	27
United States ex rel. Tillery v. Cavell, 294 F.2d 12 (3d Cir. 1961) .....	26
Waley v. Johnston, 316 U.S. 101 (1942) .....	8
Whitten v. Tomlinson, 160 U.S. 231 (1895) .....	6
Wilson v. Harris, 378 F.2d 141 (9th Cir. 1967) ....	10, 12, 24

*Statutes:*

28 U.S.C. §2241 (1964) .....	7, 31
28 U.S.C. §2243 (1964) .....	31, 33
28 U.S.C. §2254 (1964) .....	7
28 U.S.C. §2255 (1964) .....	6, 14
Fed. R. Civ. P. 1 .....	22
Fed. R. Civ. P. 5 (b) .....	22
Fed. R. Civ. P. 15 .....	32
Fed. R. Civ. P. 26—33 .....	3, 22
Fed. R. Civ. P. 34 .....	32
Fed. R. Civ. P. 53 .....	24
Fed. R. Civ. P. 59 (B) .....	32
Fed. R. Civ. P. 81 (a)(2) .....	3, 4, 8, 9, 10, 11, 12, 17, 18, 20, 23, 24, 25, 26, 27, 28, 29, 35



*Other Authorities:*

## PAGE

American Bar Association Project On Minimum Standards For Criminal Justice, Standards Relating to Post-Conviction Remedies, Tentative Draft, January 1967 (Professor Curtis Reitz, Reporter) .....	16, 27
Becker, Collateral Post-Conviction Review of State and Federal Criminal Judgments on Habeas Corpus and on Section 2255 Motions—View of a District Judge, 33 F.R.D. 452 (1963) .....	16, 31
3 Blackstone, Commentaries (6th ed., Dublin 1775) ....	30
Breitenstein, Remarks in Recent Post-Conviction Decisions, 33 F.R.D. 434 (1963) .....	16
Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423 (1961) .....	30
Carter, Pre-Trial Suggestions for Section 2255 Cases Under Title 28, United States Code, 32 F.R.D. 391 (1963) .....	16
Chaffee, How Human Rights Got Into The Constitution (1952) .....	30
Fox, Process of Imprisonment at Common Law, 39 L. Q. Rev. 46 (1923) .....	30
9 Holdsworth, A History of English Law (1926) .....	30
Jenks, The Story of the Habeas Corpus, 18 L. Q. Rev. 64 (1902) .....	30
Longsdorf, Habeas Corpus—A Protean Writ and Remedy, 8 F.R.D. 179 (1949) .....	32
Note, Civil Discovery in Habeas Corpus, 67 Colum. L. Rev. 1296 (1967) .....	17

Note, The Freedom Writ—The Expanding Use of Federal Habeas Corpus, 61 Harv. L. Rev. 657 (1948) .....	30
Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315 (1961) .....	30
Reitz, Federal Habeas Corpus: Post-Conviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461 (1960) .....	30
Wright and Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 75 Yale L. J. 895 (1966) .....	16

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1968

No. 199

---

GEORGE B. HARRIS,

*Petitioner,*

—v.—

LOUIS NELSON,

*Respondent.*

---

**BRIEF AMICI CURIAE OF THE N.A.A.C.P. LEGAL  
DEFENSE AND EDUCATIONAL FUND, INC.,  
AND THE NATIONAL OFFICE FOR THE  
RIGHTS OF THE INDIGENT**

---

**Statement of Interest of the Amici**

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is sup-

ported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in matters resulting in decisions that have had a profoundly reformatory effect upon the administration of criminal justice.

A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. In order more effectively to achieve this purpose, the LDF in 1965 established as a separate corporation movant National Office for the Rights of the Indigent (NORI), which organization has joined in the filing of this brief. This organization, whose income is provided initially by a grant from the Ford Foundation, has among its objectives the provision of legal representation to the poor in individual cases and the presentation to appellate courts of arguments for changes and developments in legal doctrine which unjustly affect the poor.

LDF and NORI attorneys have represented many prisoners in petitions for writs of habeas corpus in the federal courts, and *amici* are therefore acutely aware of the essential role of habeas corpus in the criminal process. Habeas corpus is clearly one of the most vital remedies for the protection of constitutional rights, and resolution of the issue raised in this case will determine whether habeas corpus is to be an effective remedy.

The parties have consented to the filing of an *amicus curiae* brief by the N.A.A.C.P. Legal Defense and Educational Fund, Inc. Copies of their letters of consent will be submitted to the Clerk with this brief.

## ARGUMENT

### Introduction and Summary

In this case, a panel of the Court of Appeals for the Ninth Circuit issued the prerogative writ of mandamus against the Chief Judge of the United States District Court for the Northern District of California on the theory that a federal district judge entertaining a petition for a writ of habeas corpus entirely lacks power to permit the use of interrogatories for discovery purposes. Specifically, the Court of Appeals held that written interrogatories propounded by an imprisoned petitioner to a respondent custodian are not authorized in federal habeas corpus proceedings either by statute or by Rules 33 and 81(a)(2) of the Federal Rules of Civil Procedure, hence that a district court may not lawfully allow such interrogatories.

The opinion of the Court of Appeals does not discuss the question whether, if interrogatories in habeas corpus proceedings are not authorized by the applicable federal statutes and rules, a district court could nevertheless approve their use, in an appropriate case, in the exercise of its inherent power to manage proceedings before it and to fashion efficient and practicable forms of procedure in habeas corpus matters. But the issuance of a mandamus plainly implies that no source of authority legally available to the district judge was deemed sufficient to empower him to order a party to respond to discovery interrogatories in any habeas case.

Such a decision has grave importance beyond the disallowance of interrogatories in this particular prisoner's case. The Ninth Circuit bases its result upon its construction of Federal Civil Rule 81(a)(2), the rule which governs



the applicability of the Rules of Civil Procedure generally in habeas corpus proceedings. The effect of its construction is to deny the federal habeas courts the use of any of the modern procedures prescribed by the Civil Rules, unless it can be shown either that the particular procedure is expressly authorized by statute or that it was in use in habeas corpus practice prior to 1938 (the year of initial promulgation of the Rules); and that such habeas corpus practice had, by 1938, developed identically to that in ordinary civil actions. *Amici* contend that this reading of Rule 81(a)(2) is unduly restrictive and would seriously impair the administration of the federal habeas corpus jurisdiction.

We show first, in Part I *infra*, the onerous consequences of the Ninth Circuit's ruling for habeas corpus litigants and for the federal district courts which bear the greatest share of the burden of implementing the Great Writ. In Part II, we show that these consequences are as unnecessary as they are undesirable, since nothing in law compels the Ninth Circuit's treatment of Rule 81(a)(2) either as excluding the direct application of appropriate Federal Civil Rules in habeas corpus, or as hobbling the power of a district judge to adopt appropriate provisions of the Rules as the procedures for administering his habeas corpus jurisdiction.

## I.

**The Federal Habeas Corpus Jurisdiction Should Be Administered by Modern, Efficient and Evolving Procedures Which Effectuate Its Purpose—the Vindication of the Right Against Unconstitutional Restraint.**

We begin our submission from premises which we think are indisputable, and which we therefore state summarily.

*First*, the business of the federal habeas corpus courts has multiplied in the past few years, and is now considerable. It is likely to continue to multiply in the immediate future. This development is the product of a number of factors. It responds to the evolution of substantive constitutional doctrine by this Court, which has increasingly civilized the administration of American criminal justice by the application to the States of Due Process and Bill of Rights guarantees for the criminal accused.<sup>1</sup> It reflects also a growth in the conception of the office of the federal writ of habeas corpus, in several related aspects. There has been a progressive broadening of the categories of illegal restraint against which the Great Writ affords relief.<sup>2</sup> There has been a broadening of the sorts of federal rights which the writ lies to secure, so

<sup>1</sup> E.g., *Miller v. Pate*, 386 U.S. 1 (1967); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Pate v. Robinson*, 383 U.S. 375 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Pointer v. Texas*, 380 U.S. 400 (1965); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>2</sup> It is now available, for example, to parolees, *Jones v. Cunningham*, 371 U.S. 236 (1963), to prisoners challenging a commitment under circumstances where the vindication of their constitutional claims will not result in immediate release from incarceration, *Peyton v. Rowe*, 391 U.S. 54 (1968), and notwithstanding a prisoner's incarceration terminates by reason of the expiration of his sentence before final adjudication of his habeas application, *Carafas v. LaVallee*, 391 U.S. 234 (1968).

that, far from relieving (as once it did) only against "jurisdictional" defects in the conviction court, habeas corpus is now available for the vindication of any federal constitutional violation occurring in a prisoner's trial or appeal.<sup>3</sup> And, finally, there has been a progressive appreciation of the function of federal habeas corpus as an independent forum for adjudication by the federal judiciary of a state prisoner's federal claims—a function which requires that the federal judges make their own determination of the validity of those claims, whatever view the state courts may earlier have pronounced upon them.<sup>4</sup>

Second, this development of the federal writ has involved not merely a numerical increase in the volume of cases processed, but also a shift in the subject matter of the bulk of cases, entailing a redirection of the kind of processing which the cases must receive. Thirty years ago,

---

<sup>3</sup> This Court's early decisions, in cases involving both federal and state prisoners, held that the only claims which could be raised on habeas corpus were those that went to the jurisdiction of the convicting court. *Ex parte Watkins*, 3 Pet. 193 (1830) (federal prisoner); *Ex parte Parks*, 93 U.S. 18 (1876) (federal prisoner); *Ex parte Bigelow*, 113 U.S. 328 (1885) (federal prisoner); *In re Wood*, 140 U.S. 278 (1891) (state prisoner); *Whitten v. Tomlinson*, 160 U.S. 231 (1895) (alternative ground) (state prisoner); *Frank v. Mangum*, 237 U.S. 309 (1915) (state prisoner). The "jurisdictional" concept was first stretched, in both classes of cases, by the fiction of calling grave constitutional defects "jurisdictional." *Ex parte Lange*, 18 Wall. 163 (1873) (federal prisoner); *In re Snow*, 120 U.S. 274 (1887) (federal prisoner); *Ex parte Bain*, 121 U.S. 1 (1887) (federal prisoner); *Ex parte Siebold*, 100 U.S. 371 (1879) (federal prisoner); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Medley, Petitioner*, 134 U.S. 160 (1890) (state prisoner). Later, following the *Johnson v. Zerbst* decision, the fiction was abandoned, and it was recognized that habeas corpus (or, in the case of federal prisoners, its statutory counterpart, 28 U.S.C. §2255) was available to raise any claim of fundamental constitutional error in the conviction process. *Waley v. Johnston*, 316 U.S. 101 (1942) (federal prisoner); *Fay v. Noia*, 372 U.S. 391 (1963) (state prisoner).

<sup>4</sup> *Ex parte Hawk*, 321 U.S. 114 (1944); *Brown v. Allen*, 344 U.S. 443 (1953); *Townsend v. Sain*, 372 U.S. 293 (1963).

for example, evidentiary hearings in habeas corpus were exceedingly rare, because the "jurisdictional" issues which were then thought to be the unique province of habeas corpus did not often give rise to factual disputes; because, if they did, the state courts were thought to be the only forum empowered to resolve them, provided that the state procedures for their resolution themselves complied with due process of law;<sup>5</sup> and because, as a practical matter, the substantive federal constitutional protections available to a state prisoner and likely to give rise to evidential controversies, were rudimentary. Today, "it is the typical, not the rare case in which constitutional claims turn upon the resolution of contested factual issues" requiring an evidentiary hearing in the federal habeas corpus forum. *Townsend v. Sain*, 372 U.S. 293, 312 (1963). In this aspect, as in others, the new functions which preoccupy federal habeas corpus, in these late 1960's, require sorts of inquiries and procedures different, in the vast majority of cases, than those common in writ proceedings a third or even a quarter of a century ago.

*Third*, the federal statutes specifically governing procedure in habeas corpus matters are almost entirely silent on all of the details of practice which are vitally important to the efficient, routine processing of large numbers of cases making new demands upon, and requiring new sorts of factual and legal inquiry by, the federal trial courts. The sections of the Judicial Code that are found between 28 U.S.C. §2241 and 28 U.S.C. §2254 may be searched in vain for provisions governing the principal aspects of pretrial and trial procedure, of the sort that occupy the bulk of the Federal Civil Rules and most modern State procedural codes. These federal statutes, which largely codify nineteenth century practice and the residues of nine-

---

<sup>5</sup> See *Frank v. Mangum*, 237 U.S. 309 (1915), effectively overruled by *Moore v. Dempsey*, 261 U.S. 86 (1923).

teenth century habeas corpus legislation, are obsessed with pleading—as was appropriate when trials in habeas corpus were infrequent. They are skeletal, at best, on matters relating to the preparation and presentation of evidentiary matters at a hearing. And so they fail, by a wide margin, to respond to the modern-day needs of the federal habeas corpus courts.

From these premises emerges the problem with which the present case is concerned. The lower federal courts, confronted with an application for a writ of habeas corpus that cannot be disposed of on its face, must find or devise some form of procedure or practice, not provided for by statute, that will enable them properly and efficiently to handle the case. Federal Civil Rule 81(a)(2) provides, in pertinent part:

“These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.”<sup>6</sup>

---

<sup>6</sup> The language quoted in the text is the product of the recent revision of the Federal Civil Rules, designed to integrate those rules with the newly published Federal Appellate Rules. At the time of the decision of the present case by the Court of Appeals for the Ninth Circuit, Rule 81(a)(2) read:

“In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: . . . habeas corpus. . . .”

If the revision of the rule worked any substantive change in the result which it required in the decision of this case, we think it clear that the revised Rule 81(a)(2), set forth in the text, would control decision in this Court, notwithstanding it first became effective following the Circuit Court's ruling. For it is settled that rules affecting procedural questions of the sort at issue here are applied to cases pending on appeal on the effective date of the new rule. E.g., *Ex parte Collett*, 337 U.S. 55 (1949); *Bruner v. United*



This rather obscure language will obviously support any one of a number of constructions differentially hospitable to the use of the Federal Civil Rules to fill the procedural vacuum in the habeas corpus statutes, ranging from the Ninth Circuit's reading—which would generally deny the Rules applicability—to the construction for which we shall contend, which would generally hold the Rules applicable unless there is a good functional reason, apparent in the traditional practice of the writ, for declining to apply them. We shall develop these alternative possible constructions further in Part II *infra*. For the present, our purpose is to discuss the practical consequences of the choice between an approach generally favoring, and one generally disfavoring, applicability of the Civil Rules in habeas proceedings.

The Ninth Circuit's approach is to hold that, when a habeas corpus court is faced with a procedural question that is unresolved by statute, it may utilize the procedures authorized by the Rules "only if it can be shown that,

---

*States*, 343<sup>\*</sup> U.S. 112 (1952); *Georgia v. Rachel*, 384 U.S. 780 (1966), *aff'g* 342 F.2d 336, 337 (5th Cir. 1965). It seems to us that the revised language now operative is slightly more favorable for the construction of the rule which we urge, in that the new formula "These rules are applicable . . . to the extent . . ." etc., calls more positively for the application of the Federal Civil Rules in habeas cases than the more tortuous quadruple negatives of the earlier version: "[The Rules] are not applicable otherwise than on appeal except to the extent . . ." etc. However, we must candidly note that the revisers of Rule 81(a)(2) seem to have believed that they were effecting no change in meaning by their verbal reformulation, whose purpose was stated to be to "eliminate inappropriate references to appellate procedure" in the Civil Rules, following the effective date of the new Federal Appellate Rules. See the Explanatory Note to the proposed revision of Rule 81(a)(2), 43 F.R.D. 164 (1968). In any event, our own position in this Court does not turn on exegetic niceties of language under either form of the rule, but rather on broad considerations of policy leading to a result neither compelled nor foreclosed verbally by old or by new Rule 81(a)(2).

prior to September 16, 1938, . . . [the procedure] was actually being used in habeas proceedings, and that such use conformed to the then . . . practice in actions at law or suits in equity." *Wilson v. Harris*, 378 F.2d 141, 144. The year 1938 was, of course, the date of first promulgation of the Federal Rules of Civil Procedure, hence the point of reference of the "heretofore" in Rule 81(a)(2). It was also the year of decision of *Johnson v. Zerbst*, 304 U.S. 458, the landmark opinion in the evolution of federal habeas corpus from a narrow remedy concerned with "jurisdictional" defects to a broadly available forum for the vindication of federal constitutional rights denied in the criminal trial process.<sup>7</sup> As we have said, prior to this year, trial practice in habeas corpus was rudimentary since trials themselves very seldom were had. As a result, issues arising in habeas cases today relating to discovery, request for admissions, pretrial conferences, summary judgment, consolidation and severance, procedures for and at an evidentiary hearing, findings of fact and conclusions of law by the court, etc., must be resolved—under the Ninth Circuit's view—without the guidance of the Rules.

As a further result, we would suppose, the question is posed: to what body of rules *does* a habeas corpus court look in ruling on a request for discovery, for a pretrial conference, for summary judgment, etc.? Surely there must be some source of law or practice from which principles can be drawn to determine these rulings. For a habeas court, like any other, inevitably applies or makes procedural law however it may act—whether it allows or disallows interrogatories or a deposition, holds or declines to hold a pretrial conference, entertains or refuses to entertain a summary judgment motion. If the statutes of the United States are silent (as they are) and if the

<sup>7</sup> See note 3 *supra*.

Federal Civil Rules do not apply (as the Ninth Circuit says they do not), how is a habeas judge to know what to do? The available answers to this question seem to be two: either he must act as a habeas corpus judge would have acted prior to September 16, 1938; or he must draw from and contribute to the development of a contemporary common law of federal habeas corpus procedure—an evolving canon of regulations and practices governing procedure under the Great Writ.

The Ninth Circuit neither formulated nor expressly answered this latter question, but its holding disallowing the use of interrogatories approved by Judge Harris necessarily contains its answer: a federal habeas corpus court in 1968 is to act, as near as may be, like a federal habeas corpus court prior to 1938. As a consequence, federal habeas corpus practice is to be frozen in its pre-1938 mold. Today's practical problems are to be met with the answer thirty years ago.

This result would be intolerable in any kind of legal proceeding. It would be aberrant as well as unserviceable, for we know of no sort of proceeding in which there exists a principle, like that embodied in the Ninth Circuit's construction of Rule 81(a)(2), which forbids courts to develop and evolve rules of practice, in matters not governed by statute, responsive to contemporary problems and informed by contemporary thinking and experience. But the result would be peculiarly indefensible in habeas corpus. It would affront the most basic tradition of the writ: its flexibility and growth as a form of procedure "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Fay v. Noia*, 372 U.S. 391, 401-402 (1963). Habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its general purpose—the protection

of individuals against erosion of their right to be free from wrongful restrictions upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963), quoted in *Peyton v. Rowe*, 391 U.S. 54, 66 (1968). Moreover, it would freeze the procedural evolution of the writ at a uniquely inopportune date, 1938, just prior to the major developments which have largely defined the modern-day business of the federal habeas corpus courts and confronted them with their contemporary procedural problems.<sup>8</sup>

The specific issue framed in the present case exemplifies the difficulties in the Ninth Circuit's approach to Rule 81(a)(2). Under that approach, there can be no discovery of any sort in a habeas corpus case. (The opinion below, explicitly disallows depositions on oral examination or on written interrogatories, as well as interrogatories to parties "for general discovery purposes," 378 F.2d at 144, and its reasoning equally forbids inspection of documents and other tangible objects, requests for admissions, pretrial conferences, etc.) Discovery is forbidden notwithstanding the experience of the past thirty years in ordinary civil cases has demonstrated overwhelmingly the extraordinary utility of various discovery devices in litigation which will or may go to a factual hearing. As this Court put it in *Hickman v. Taylor*, 329 U.S. 495, 500-501 (1947):

"The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. . . . The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence

<sup>8</sup> See text and notes at notes 1-4 *supra*.

or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

In addition to the well-known virtues of discovery found in conventional civil litigation, pre-trial discovery provides special advantages to the parties and to judicial administration in habeas cases. The habeas petitioner is enabled to learn the specific facts supporting his claims quickly and inexpensively. This may spell the difference between whether the claims are established or not, for habeas petitioners are usually poor men, represented, if at all, by appointed counsel who are normally unable to sponsor independent fact-gathering investigations. Given the summary nature of much habeas practice, illegalities known only to government officials can be uncovered solely by pretrial inquiry. Thus, the availability of adequate discovery procedures will enable many petitioners who would otherwise be left with unsubstantiated allegations to demonstrate an unconstitutional detention.

Discovery is, of course, also advantageous to the habeas respondent. It may be used to reveal that a petitioner's claims are wholly spurious or that no triable issues of fact exist, thus avoiding a full evidentiary hearing. This Court has held that disputed factual issues may be determined by the habeas corpus court only after a hearing, *Townsend v. Sain*, 372 U.S. 293 (1963), and the question whether there are disputed factual issues often cannot be decided without pretrial investigation. Most habeas corpus petitions are drafted in the first instance by prisoners, not attorneys; prisoners are seldom very precise



pleaders; even if and after counsel is appointed for a habeas petitioner, the lawyer is ordinarily loth to abandon, on his own responsibility, any of the claims of constitutional violation which the petitioner suggested in his initial *pro se* pleading; and these claims, frequently, consist of little more than conclusory generalities framed in the language of a prior judicial opinion that has come to the prisoner's hand. Such allegations may have no factual basis whatever, or they may conceal a factual claim of indisputable merit. That discovery devices are particularly helpful in determining the existence of triable issues of fact has been recognized by Courts of Appeals, *Rodgers v. Bennett*, 320 F.2d 83, 86 (8th Cir. 1963); *Copenhaver v. Bennett*, 355 F.2d 417, 421-422 (8th Cir. 1966), including the Ninth Circuit itself in federal-prisoner cases under 28 U.S.C. §2255, *Dodd v. United States*, 321 F.2d 240, 246 (9th Cir. 1963); *Russell v. United States*, 321 F.2d 533 (9th Cir. 1963). And, even where an evidentiary hearing is found to be unavoidable, the respondent will often be able to make profitable use of discovery to anticipate and meet all of the claims which a petitioner may assert at the hearing—sometimes without prior notice<sup>9</sup>—against the validity of his detention.

The importance of these several functions of discovery to the efficient administration of justice in habeas corpus matters is underlined by the circumstance that doctrines such as *res judicata* and collateral estoppel which are employed to give finality to even imperfect adjudications in ordinary civil actions are—for good reason—inapplicable or relaxed in habeas cases. *Sanders v. United States*,

---

<sup>9</sup>In accordance with the spirit of *Sanders v. United States*, 373 U.S. 1 (1963), many federal district judges quite properly permit—and some compel—a prisoner to raise at a federal habeas corpus hearing any and all claims he may then have, whether or not previously framed by his pleadings.

373 U.S. 1 (1963). In consequence, a full and fair, adequately informed and adequately prepared initial factual hearing on a habeas corpus petition raising a legally colorable issue is indispensable to the avoidance of successive repeater petitions, requiring renewed legal and factual consideration by the court, which are no less a burden to the judicial system whether they be justified attempts by a prisoner to remedy the defects in prior habeas corpus hearings or mere frivolous obstinacy in pressing a previously, fully and fairly heard and rejected contention. Effective use of discovery devices would do much to eliminate or at least to expedite the handling of these frequent repeater petitions that cause unnecessary waste and irritation within the federal system. First, as suggested above, discovery would allow frivolous claims to be detected and dealt with in summary fashion, while, at the same time, helping to assure the fullest possible hearing for any colorably meritorious claim. Second, by making the court and the parties aware of not only the facts now known to the prisoner bearing on his specific claims initially raised, but all other available facts bearing on those claims, and also factual matters supporting other viable related claims which the prisoner may have at his disposal and later raise, discovery would provide a means for considering all such constitutional claims at the earliest possible time—for providing “meaningful factual hearings on alleged constitutional deprivations . . . before memories and records grow stale,” *Peyton v. Rowe*, 391 U.S. 54, 65 (1968)—and thereby for effectively limiting the number of successive habeas petitions which need receive plenary hearing. This Court has already indicated the desirability of employing all procedures available to a habeas corpus court to expedite the hearing of every meritorious claim the petitioner may have.

"[T]he imaginative handling of a prisoner's first motion would in general do much to anticipate and avoid the problem of a hearing on a second or successive motion. The judge is not required to limit his decision on the first motion to the grounds narrowly alleged, or to deny the motion out of hand because the allegations are vague, conclusional, or inartistically expressed. *He is free to adopt any appropriate means for inquiring into the legality of the prisoner's detention in order to ascertain all possible grounds upon which the prisoner might claim to be entitled to relief.* Certainly such an inquiry should be made if the judge grants a hearing on the first motion and allows the prisoner to be present." *Sanders v. United States*, 373 U.S. 1, 22-23 (1963). (Emphasis added.)

It is no accident, therefore, that the use of discovery in habeas proceedings has been urged by respected authorities, on the ground that it would provide "the most promising possibility for saving time and expense and for avoiding the tension caused by full-dress hearings." Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 934 (1966). See AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES, Tentative Draft, January 1967, p. 70 (Professor Curtis Reitz, Reporter); Carter, *Pre-Trial Suggestions for Section 2255 Cases Under Title 28, United States Code*, 32 F.R.D. 391 (1963); Breitenstein, *Remarks on Recent Post Conviction Decisions*, 33 F.R.D. 434, 444-445 (1963); Becker, *Collateral Post-Conviction Review of State and Federal Criminal Judgments on Habeas Corpus and on Section 2255 Motions—View of a District Judge*, 33 F.R.D.

452, 492 (1963); *Note, Civil Discovery in Habeas Corpus*, 67 COLUM. L. REV. 1296 (1967). Not only does the decision below deny the federal courts every discovery device, without exception, which has been thought or proved by experience to have the promise thus described, but also virtually every other modern procedural device favorable to the expeditious, fair and efficient handling of cases appearing to present litigable factual controversies.

We therefore respectfully suggest that the Ninth Circuit's ruling is so impracticable, so unworkable, so intolerably unresponsive to the needs of the federal habeas corpus jurisdiction today, that it should not be permitted to stand unless it is compelled by the text of Rule 81(a)(2)—as we shall show in the next section of this brief that it is not. There remains to consider here, however, whether the Court of Appeals' approach to Rule 81(a)(2) is not supportable in some part, if not in whole.

As we have pointed out, the decision below involves two distinct holdings, one express and the other tacit. The Ninth Circuit held expressly that Rule 81(a)(2) did not make the Federal Civil Rules governing discovery applicable in habeas cases. It necessarily held *sub silentio* also that the effect of the Rule was to disempower federal habeas judges, in the exercise of their ordinary powers to conduct litigation before them, to adopt procedures akin to those provided by the Civil Rules—that it stopped the clock of procedural habeas corpus evolution in 1938 and disallowed subsequent common-law evolution taking guidance, where appropriate, from procedures used in civil matters under the Rules.

The first of the Ninth Circuit's holdings, of course, does not logically entail the second; for it might be held at once that the Federal Civil Rules, by force of Rule 81(a)(2),

do not apply in habeas corpus, and yet that habeas corpus courts have what petitioner Harris called in his petition for *certiorari* the "inherent powers" to develop and evolve fitting procedural incidents of the Great Writ.<sup>10</sup> As we have indicated earlier in this section, the issue of "inherent powers" seems to us approachable rather as a question of inherent necessity, since a habeas corpus judge, like any other, must make rulings on matters before him and thereby must make law, whatever its content. The question, we think, is what sources and principles of law he should look to in those rulings. If our view is accepted that the answer cannot lie in pre-1938 habeas corpus practice, two possibilities remain: the Federal Civil Rules, or an evolving, judge-made, common-law body of habeas corpus procedures. Although reference to *either* of these sources would sustain Chief Judge Harris' ruling herein and require reversal of the Ninth Circuit's judgment, choice between the two sources is vitally important and, in our view, should be made by the Court in deciding this case. We therefore conclude this section with a consideration of the relative merits of the two.

Surely, a holding that the Civil Rules do not generally apply in habeas corpus (by reason of the construction of Rule 81(a)(2) given by the Ninth Circuit or one similarly restrictive), but that the habeas corpus courts have plenary power to adopt fit forms of procedure on an *ad hoc*, common-law basis, presents none of the unbearable inconveniences described above as attending the freezing of habeas corpus procedures in the year 1938. Such a holding, however, seems to us less desirable, for several reasons, than a holding that the Civil Rules generally do apply—or, to restate our exact submission, that they apply in the absence of specific statutory regulation and

<sup>10</sup> See Petition, p. 8.



unless some functional reason manifest in the traditional evolution of habeas corpus practice requires that they not be applied. These reasons are entirely practical, and may be briefly summarized:

(1) In general, it is preferable that procedural matters be regulated by a specific, published, readily available code of rules, than that they be governed by unwritten practice or by a corpus of common-law precedents scattered through the Federal Reporters. This is so because codification simplifies the work both of judges and of lawyers; written rules are more quickly and handily available than the common law (even where the common law does speak to the specific issue facing the judge or lawyer, as often it does not); and, even where a published rule has been glossed by judicial construction, legal research is facilitated if the pertinent jurisprudence begins with an accessible text. It must be remembered that procedural questions of the sort involved in this case only infrequently become the subject of appellate consideration, hence of published opinions; and, certainly, procedural regularity and efficiency alike are served if proceedings are governed by written regulations rather than by unwritten practice. These considerations are particularly compelling in habeas corpus matters, for two additional reasons. First, many habeas cases are still processed without the appointment of counsel, and a prisoner acting *pro se* is far more likely to have accessible and comprehensible to him the text of the Federal Rules than either a knowledge of unwritten practice or even the case reports of pertinent common-law judicial decisions. Second, when counsel is appointed to represent an indigent prisoner (and most federal habeas petitioners are indigent), the lawyer is likely to be a general practitioner not particularly experienced in the specialized practice or case law

of habeas corpus. Acting generally without compensation, he has limited resources, and is more likely to be effective with easy-to-find procedures—particularly the procedures of the Federal Rules, with which he is familiar in ordinary civil litigation—than with procedures defined by a less visible body of practices and judicial decisions.

(2) This last consideration—the familiarity of the federal rules to lawyers and judges—has broader implications as well. The point, simply, is that it is easier for a system to operate with one body of rules than with two, and that this added ease is itself a persuasive reason against multiplying differing codes of rules for different proceedings—unless there is some countervailing good reason to do so.

(3) In general, there is no good reason not to use the Federal Civil Rules in habeas cases. The Rules are the product of very considerable experience and thought. They are the subject of continuing study by a concerned Rules Committee, attentive to the common problems of factual litigation and informed respecting alternative procedural devices for coping with those problems. They are periodically revised to reflect the most enlightened, modern and practical procedural thinking of the times. The benefits of the experience and thought that attend the formulation of the Rules should not be denied a habeas corpus forum unless—again—some specific reason appears why habeas corpus is different in its needs and circumstances from other civil proceedings.

(4) Our formulation for the applicability of the Federal Rules in habeas cases would take account of any such specific reasons where, and to the extent that, they exist. We suggest that Rule 81(a)(2), making the Rules apply

to habeas corpus "to the extent that the practice in [habeas] . . . has heretofore conformed to the practice in civil actions" be read to mean that the Rules govern procedure in habeas corpus unless the traditional practices in writ proceedings manifest a peculiar characteristic of such proceedings which has caused the development of a distinct body of procedures traditionally variant from the proceedings in civil cases generally. Our own experience—(counsel for *amici* have maintained a very considerable amount of litigation both in habeas corpus and in civil actions in the federal courts)—is that habeas resembles other civil actions, in its needs and circumstances, in more particulars than it differs from them. But where there do exist differences, they have found expression in the development of identifiable specialized habeas procedures—such as the rule to show cause, first devised by judicial practice and later codified in statute—which respond to them. In the absence of a showing that such procedures have developed, which have not "conformed to the practice in civil actions," and of course in the absence of any specific statutory regulation of a procedural point, we think that there can be no basis for the contention that habeas is a solecism so unlike ordinary civil litigation that application of the Rules governing most civil cases (including such varying cases as diversity actions for damages growing out of an automobile collision, and injunctive proceedings to restrain the enforcement of an unconstitutional state statute) would be dysfunctional in habeas.

(5) Finally, the Federal Civil Rules, where they apply, do not usually dictate an inflexible, iron-clad, unitary method of proceeding. They ordinarily leave considerable discretion for particularistic administration by the district judge, in light of the over-all nature of the case

before him and the general command of the Rules that they be construed "to secure the just, speedy, and inexpensive determination of every action." FED. RULE CIV. PRO. 1. Here again there is ample room for adjustment of particular rules where the individual characteristics of a habeas case require. On the other hand, the Rules do contain provisions of sufficient specificity to guide the orderly conduct of a case routinely and efficiently unless judicial action is requested and taken to make some adjustment of them. It is, for example, impossible to fault the holding of the Court of Appeals for the Fifth Circuit in *Fortner v. Balkcom*, 380 F.2d 816 (5th Cir. 1967), that interrogatories in a habeas matter could not properly be propounded without the adequate notice required by Rules 5(b) and 31. This requirement might have been waived, for good cause shown, on application to the court; but in the absence of such an application, there seems no reason why the notice provisions applicable in a habeas case should differ from those in any other case, and still less reason for a general holding that the Civil Rules are inapplicable, with the result that habeas courts must invent case-by-case the appropriate forms and times of notice. Least of all does it appear to us that it should be said, as the Ninth Circuit below has said, that interrogatories are entirely unavailable in habeas corpus, when every consideration of experience urges that in habeas identically with other civil actions which may go to evidentiary hearing, the hearing is more fairly and efficiently conducted with the benefit of pretrial discovery proceedings.

## II.

**Rule 81(a)(2) Makes the Federal Rules of Civil Procedure Applicable in Habeas Corpus Except When a Statute Governs or When a Distinct, Traditional Practice of Habeas Procedure Variant From the Procedure in Ordinary Civil Actions Manifests Unique Characteristics of the Writ That Make the Rules Unserviceable. In Any Event, Federal Trial Courts Are Empowered to Adopt the Procedures Described in the Rules as a Consequence of Their Undeniable Power to Formulate Adequate Procedures for the Administration of the Habeas Corpus Jurisdiction.**

In the preceding section of this brief, we have attempted to identify the considerations which, as a practical and normative matter, affect the question whether the Federal Civil Rules ought or ought not generally to be applied in habeas corpus cases. We have concluded that the decision of the Ninth Circuit, denying applicability of the Rules and incidentally freezing habeas corpus procedure as of 1938 ought to be avoided unless no other construction of Rule 81(a)(2) is supportable. We have considered two alternative positions available if the Ninth Circuit's is rejected: one which would hold the Rules inapplicable but leave the federal habeas courts free to develop a common-law body of contemporary habeas corpus procedures; and another which would generally apply the Federal Rules in the absence of good reason not to apply them. As between these two positions, we have explained the reasons which we think favor the latter. There remains to be considered whether the text of Rule 81(a)(2) or other non-normative concerns require the Ninth Circuit's interpretation or preclude the lawful adoption of the one which we espouse.

The text of the Rule, set forth at p. 8 *supra*, calls for the application of the Federal Civil Rules "to the extent



that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." We take it that no issue arises in the present case respecting the first of these two conditions. Plainly no federal statute describes habeas corpus practice in the matter of discovery, and the Ninth Circuit does not suggest the existence of any such statute.<sup>11</sup> The case turns upon the meaning of the second requirement: that practice in habeas matters have "heretofore conformed to the practice in civil actions."

We submit that this language has no such plain meaning as would preclude consideration of the strong reasons set forth in Part I, *supra*, for rejecting the Ninth Circuit's interpretation of Rule 81(a)(2).<sup>12</sup> The Ninth Circuit's requirement that the requisite conformity be affirmatively shown by one who seeks to invoke one of the Federal Civil Rules by demonstrating that the procedure authorized under the Rule "was actually being used in habeas proceedings, and that such use conformed to the then . . . practice in actions at law or suits in equity," 378 F.2d at 144, is a verbally possible construction, but surely not the only possible construction. Indeed, it has some logical difficulties as applied to questions like that posed in the present case, where what is at issue is the availability of a form of procedure, rather than the regulation of details involved in administering a procedure. For if the procedure cannot be shown to have been in use prior to

---

<sup>11</sup> In a matter where a direct conflict existed between the Rules and a federal statute, this Court of course did not hesitate to preclude utilization of the Rule. In *Holiday v. Johnston*, 313 U.S. 342 (1941), it was held that since Section 761, now 28 U.S.C. §2243, specifically required that the judge decide the facts of a case, his role could not be superseded by a master, as authorized in civil proceedings by Rule 53.

<sup>12</sup> We have also found nothing compelling, or even instructive, in the history of Rule 81(a)(2), its successive Advisory Committee Notes, or other interpretive materials.

1938, the Rules do not make it available; whereas if it can be shown to have been in use prior to 1938, it would continue to be available on the effective date of the Rules with or without their sanction. Rule 81(a)(2), then, in this situation, makes the Rules either inapplicable or superfluous. The effect of the Rules in ordinary civil actions was to be in some instances major innovation (as in the discovery area); in other instances, mere codification or slight change of existing practice. In habeas corpus matters, under the Ninth Circuit's construction the Rules could be given only the latter, minor effects. And it is not obvious why the latter effects would not have been given to the Rules in matters wherein habeas practice had "conformed" to practice in law and equity, in this sense of conformity, even if Rule 81(a)(2) had taken the simpler approach of excluding habeas corpus entirely from the direct application of the Rules. See cases cited in note 20 *infra*.

In any event, it does not appear to us that the Ninth Circuit's reading of the text of Rule 81(a)(2) is compelling as a verbal matter. Our own suggested construction, making the Rules applicable unless established pre-1938 traditions had developed distinct and established habeas corpus procedures different from those in ordinary civil actions, is surely not foreclosed linguistically. Practice in habeas corpus conformed to practice in civil actions if, in general, a habeas corpus judge would look to the same sources of procedural law as would a judge in a civil action when an identical issue arose; and this was the case unless habeas had developed its own specific and distinctive procedures. "Practice" is used here in its natural and general sense as designating the method by which specific procedural questions are decided rather than in the Ninth Circuit's meaning of the specific and individual procedural rulings themselves, a meaning which has the difficulty, at the very least, of obscurity when specific rul-

ings were not in fact being made or their purport preserved. And, of course, the Ninth Circuit's construction entails the further difficulty that habeas corpus courts which would have decided a procedural question conformably to the practice at law had the occasion arisen prior to September 16, 1938 were precluded from doing the same when the question first arose after September 16—a result which the draftsmen of Rule 81 could hardly have intended even if logic alone, without concern for practicality, governed their thinking.<sup>13</sup>

Unsurprisingly, therefore, the lower federal courts have, for the most part, taken our approach rather than that of the Ninth Circuit, to construction and application of Rule 81(a)(2). When dealing with procedural questions that had not been governed, prior to 1938, by a recognizably distinctive set of practices plainly developed and demarked in the habeas corpus case law, the Courts of Appeals and District Courts have relatively routinely applied the Federal Civil Rules in habeas proceedings.<sup>14</sup> These courts have generally done so without inquiring to discover—as

<sup>13</sup> We do not ignore that the interpretation which we place on Rule 81(a)(2) would govern the applicability of the Federal Civil Rules not only to habeas corpus, but also to quo warranto, forfeiture, etc. We see no difficulties in the application to those proceedings of our principle that the Federal Rules should govern in the absence of an established procedure distinctive in the practices of each proceeding, that differs from the usages of ordinary civil actions.

<sup>14</sup> See, for example, *United States ex rel. Tillery v. Cavell*, 294 F.2d 12 (3d Cir. 1961) (Rule 60(a)); *McGarrah v. Dutton*, 381 F.2d 161 (5th Cir. 1967) (Rule 26(d)(3), (4)); *Bowdidge v. Lehman*, 252 F.2d 366 (6th Cir. 1958) (Rule 56); *Abel v. Tinsley*, 338 F.2d 514 (10th Cir. 1964) (Rule 60(b)); *United States ex rel. Bruno v. Herold*, 39 F.R.D. 570 (N.D.N.Y. 1966), *aff'd on rehearing*, 271 F. Supp. 491 (N.D.N.Y. 1967) (Rule 60(b)); *Bowen v. Boles*, 258 F. Supp. 111 (N.D.W. Va. 1966) (Rule 6(b)(2)); *In re McShane's Petition*, 235 F. Supp. 262 (N.D. Miss. 1964) (Rule 56); *Lyles v. Beto*, 32 F.R.D. 248 (S.D. Tex. 1963), *subsequent history in* 329 F.2d 332 (5th Cir. 1964) (Rule 45(e)(1)); *Hamilton v. Hunter*, 65 F. Supp. 319 (D. Kan. 1946) (Rule 15(b)). But see note 20 *infra*.

the decision below would require—whether the particular Federal Rules procedure which they held applicable had been established in the pre-1938 habeas corpus practice by specific and affirmative usage conforming to the usage in law or equity. Rather, in the absence of a distinct, established habeas corpus usage controlling the point and differing from its resolution in legal and equitable actions, the courts simply conclude that “Habeas corpus is a civil proceeding governed by the Federal Rules of Civil Procedure, Rule 1, Rule 81(a)(2),”<sup>15</sup> and they apply the appropriate Federal Rule.

Thus, there has been widespread use of the discovery-deposition procedures authorized by Federal Civil Rules 26 through 33 in habeas corpus matters. See *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962) (Rule 36, requests for admissions); *Molignaro v. Dutton*, 373 F.2d 729 (5th Cir. 1967) (Rule 31, depositions on written interrogatories); *Fortner v. Balkcom*, 380 F.2d 816 (5th Cir. 1967) (same); *Rodgers v. Bennett*, 320 F.2d 83, 86 (8th Cir. 1963) (Federal Civil Rules governing discovery generally); *Knowles v. Gladden*, 254 F. Supp. 643 (D. Ore. 1965), *subsequent history in* 378 F.2d 761, (9th Cir. 1967) (Rules 26 and 30, depositions). These reported decisions are merely the top of the iceberg. Counsel for *amici* have had an extended practice in federal habeas corpus matters in dozens of federal districts, and know from experience that many district courts routinely employ the Federal Civil discovery rules in such matters.<sup>16</sup> That practice is

<sup>15</sup> *Bowdidge v. Lehman*, 252 F.2d 366, 368 (6th Cir. 1958) (Rule 56). See, e.g., *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 64 (5th Cir. 1962) (Rule 36).

<sup>16</sup> “It has been reported that, in Texas, the full panoply of discovery techniques of the Federal Rules of Civil Procedure is available in federal habeas corpus proceedings brought by state prisoners.” AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES, Tentative Draft, January 1967, p. 70 (Professor Curtis Reitz, Reporter).



consonant with the expressly announced expectation of this Court in *Brown v. Allen*, 344 U.S. 443, 464-465 n. 19 (1953) (emphasis added):

"Other sections strengthen the ability of the court hearing the application fully to advise itself concerning prior hearings of the same issues for the applicant. 28 U.S.C. § 2245 allows a certificate as to certain facts; § 2246 provides for depositions and affidavits. Section 2247 makes liberal provision for the use of records of former proceedings in evidence. See also §§ 2248-2254, inclusive. *Of course, the other usual methods of completing the record in civil cases, such as subpoena duces tecum and discovery, are generally available to the applicant and respondent.*"

The significance of the experience of these lower federal courts, whose practice we urge this Court to approve, is two-fold. First, we believe that it supports our contention that the Ninth Circuit reading of Rule 81(a)(2) is not compelled by the plain meaning of the Rule. We would hardly suppose that so many federal judges had overlooked a plain meaning that the court below somehow perceived. Second, the pervasive use of discovery practice under the Federal Civil Rules in habeas matters in many districts demonstrates the validity of our contention that these rules are fully compatible with the nature and functions of habeas corpus. Not only have the rules been freely and widely used without observed dislocation; they have proved to be valuable and serviceable tools for the administration of the habeas corpus jurisdiction. Accordingly, we submit it is apparent that nothing in the character of habeas corpus is so alien to ordinary civil litigation as to make use of the civil discovery rules inappropriate. This conclusion both supports our construc-



tion of Rule 81(a)(2) and establishes that under it Chief Judge Harris' employment of Rule 33 herein to authorize discovery interrogatories in a habeas corpus proceeding is altogether lawful and proper.

If we are wrong in this submission, however, and Rule 81(a)(2) is not to be read as making the Federal Civil Rules governing discovery directly applicable in habeas cases, we think it nevertheless quite clear that Judge Harris was lawfully empowered to adopt and employ the procedure described by Civil Rule 33, in the exercise of his necessary and inherent power to regulate proceedings before him and to devise appropriate and practicable procedures in habeas corpus matters. In the closing pages of Part I, *supra*, we have stated why we believe it would be preferable for this Court to hold the civil discovery rules directly applicable to habeas proceedings, rather than to hold that—while the rules do not apply of their own force—a district judge has discretion to adopt appropriate procedures described by them, in his administration of the habeas corpus jurisdiction. If, however, Rule 81(a)(2) is construed inhospitably to the application of the Civil Rules, with the result that a choice must be made between allowing discretion to the district courts to devise a fluent and evolving common law of habeas corpus procedure that refers to the Rules for guidance in appropriate cases, or, on the other hand, ossifying habeas corpus procedure in the forms prevailing before 1938 as did the Ninth Circuit below, the stunting and destructive consequences of the Ninth Circuit's approach make the recognition of district court discretion plainly the only tolerable course. As for the question whether there exists a legal source of such discretion, the answer is incontrovertible.

This Court has time and again recognized the flexibility of the Great Writ, e.g., *Jones v. Cunningham*, 371 U.S.

236, 243 (1963); *Townsend v. Sain*, 372 U.S. 293, 311-319 (1963); *Peyton v. Rowe*, 391 U.S. 54, 65-67 (1968), its capacity for growth to respond to the developing demands upon its function "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints," *Fay v. Noia*, 372 U.S. 391, 401-402 (1963). That capacity for growth has been amply demonstrated in both the English and the American experience of centuries,<sup>17</sup> and again, with striking recency, in the history of habeas corpus in this Court during the past few decades.<sup>18</sup> The Court has also recognized that the traditions of the writ call for broad discretion of trial judges in its administration, to the end that the writ "not lose its effectiveness in a procedural morass," *Price v. Johnston*, 334 U.S. 266, 269 (1948). See *Darr v. Burford*, 339 U.S. 200, 210 (1950); *Frisbie v. Collins*, 342 U.S. 519, 520-522 (1952); *Fay v. Noia*, 372 U.S. 391, 438-439 (1963); *Townsend v. Sain*, 372 U.S. 293, 313, 318 (1963); *Sanders*

---

<sup>17</sup> Concerning the earliest emergence of the writ from a mere form of body process into a guarantor of individual liberty, see Jenks, *The Story of the Habeas Corpus*, 18 L. Q. REV. 64, 67-68 (1902); Fox, *Process of Imprisonment at Common Law*, 39 L. Q. REV. 46 (1923). The later English history of the development of *habeas corpus ad subjiciendum* as the cardinal safeguard of freedom is in large measure the history of the writ's disentanglement from fettering procedures which impeded its effectiveness. See 3 BLACKSTONE, COMMENTARIES 134-138 (6th ed., Dublin 1775); 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 111-119 (1926); CHAFFEE, HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION 51-64 (1952). The American experience is exhaustively described in the opinions in *Fay v. Noia*, 372 U.S. 391 (1963), and *Townsend v. Sain*, 372 U.S. 293 (1963), and in, e.g., Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Reitz, *Federal Habeas Corpus: Post-conviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948).

<sup>18</sup> See notes 2, 3, 4 *supra*.

v. *United States*, 373 U.S. 1, 18-19 (1963). Plainly, the teaching of the traditions reflected in these opinions is that the federal courts, in the exercise of the jurisdiction conferred by 28 U.S.C. §§2241 *et seq.*, have exceedingly broad and motile powers to fashion procedural devices needful and fitting for administration of proceedings in habeas corpus, in the service of its historic office as "the great and efficacious writ, in all manners of illegal confinement."<sup>19</sup> Explicit statutory recognition of the principle, indeed, is found in 28 U.S.C. §2243 (1964), which empowers habeas corpus judges to "summarily hear and determine the facts, and dispose of the matter as law and justice require." Both this Court and the lower courts have made frequent, free and liberal use of the power. E.g., *Ex parte Clark*, 100 U.S. 399 (1879) (issuance by a single Justice of the writ returnable before the Court; admission of the petitioner to bail by the single Justice); *Ex parte Mitsuye Ende*, 323 U.S. 285 (1944) (retention of jurisdiction notwithstanding transfer of custody of the petitioner out of the jurisdiction); *In re Burwell*, 350 U.S. 521 (1956) (issuance of certificate of probable cause by a Court of Appeals without statutory authority); *Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955) (admission of habeas petitioner to bail); *Sisquoc Ranch Co. v. Roth*, 153 F.2d 437 (9th Cir. 1946) (extension of "next friend" practice); *Thomas v. Duffy*, 191 F.2d 360 (Denman, C.J., 1951), approved in *Thomas v. Teets*, 205 F.2d 236 (9th Cir. 1953) (stay of execution pending exhaustion of state remedies); *Adderly v. Wainwright*, 272 F. Supp. 530 (M.D. Fla. 1967) (recognition of power to entertain class action challenging constitutionality of death penalty on behalf of all condemned men in State; order allowing counsel to interview all condemned men to determine

<sup>19</sup> 3 BLACKSTONE, COMMENTARIES 131 (6th ed., Dublin 1775).

if class action is practicably appropriate); *Hill v. Nelson*, 272 F. Supp. 790 (N.D. Cal. 1967) (order prescribing detailed procedures for the protection of condemned men in similar case begun as class action but found not practicably to be entertained as such); *Hill v. Nelson*, N.D. Cal., No. 47318, unreported order of Chief Judge Harris, February 5, 1968 (consolidating cases challenging constitutionality of death penalty and providing for centralized and continuing administration by a single district judge, for protection of the condemned men).<sup>20</sup>

A particularly significant instance, for present purposes, of the traditional flexibility and procedural adaptability of habeas corpus process is one that has become a classic: the Nineteenth Century judicial creation of the rule to show cause. This procedure, originally devised and long practiced by the federal habeas corpus courts without Congressional authority,<sup>21</sup> was found commonly service-

---

<sup>20</sup> Significantly, those courts which have thought that various sections of the Federal Civil Rules were not directly applicable in habeas corpus proceedings have nevertheless remarked that their inherent power would allow them to apply such rules by analogy. *United States ex rel. Goldsby v. Harpole*, 249 F.2d 417, 420 n. 3 (5th Cir. 1957); *United States ex rel. Jelic v. District Director*, 106 F.2d 14, 20 (1939). While in *Sullivan v. United States*, 198 F. Supp. 624 (S.D.N.Y. 1961) (a federal prisoner case under §2255, which also discusses habeas corpus as though the remedies were convertible for this purpose), the district court refused to allow direct application of the interrogatory provisions of the Federal Rules, it specified that it had previously allowed the discovery of documents under Rule 34 in the exercise of its inherent power. The district court in *Hardison v. Dunbar*, 256 F. Supp. 412 (N.D. Cal. 1966), followed an especially flexible approach to the use of the Federal Rules, discussing not only the applicability of Rules 15 and 59(b) by analogy, but also modification of these rules in view of the unique needs of habeas cases.

<sup>21</sup> See *Ex parte Watkins*, 3 Pet. 193, 196 (1830). The procedure is described in *Ex parte Collins*, 154 Fed. 980, 982-983 (C.C.N.D. Cal. 1907), *aff'd* 214 U.S. 113 (1909); *Dorsey v. Gill*, 148 F.2d 857, 865-872 (D.C. Cir. 1945); *Longsdorf, Habeas Corpus—A Protean Writ and Remedy*, 8 F.R.D. 179, 187-188 (1949).

able, and was finally approved by statute in 1948.<sup>22</sup> Functionally viewed, it was the last Century's counterpart of modern discovery devices, performing for a habeas corpus jurisdiction concerned principally with legal issues what such procedures as depositions and interrogatories perform for a jurisdiction concerned principally with factual ones.

So it is consistent, we submit, with the oldest and most firmly established traditions of the Great Writ, to recognize in the federal district courts ample originaive and administrative power to order discovery on an *ad hoc* basis in an appropriate habeas corpus case, modeling their procedures on the familiar patterns of the Federal Civil Rules, as did Judge Harris here. Whether the present case was indeed an appropriate one—as we think but need not argue it was—is a question for Judge Harris' discretion. The Ninth Circuit did not purport to review the exercise of that discretion, as indeed it could not properly do on this record, within the fitting scope of a mandamus. Rather, it held that Judge Harris lacked power to order compliance with discovery interrogatories. In this it erred, and its judgment should be reversed.

## CONCLUSION

The unique importance of habeas corpus in our constitutional scheme is emphasized by the command of Art. 1, §9, c. 2, that "The Privilege of the Writ of Habeas Corpus shall not be suspended. . . ." The relationship between procedural restrictions which hamper the effective enforcement of the writ and its suspension was first noted by Chief Justice Marshall in *Ex parte Bollman*, 4 Cranch 75, 95 (1807): "for if the means be not in exist-

<sup>22</sup> 28 U.S.C. §2243 (1964).



ence, the privilege itself would be lost, although no law for its suspension should be enacted." The relationship has been noted again as recently as *Sanders v. United States*, 373 U.S. 1 (1963). And this Court has repeatedly expressed the concept that "“there is no higher duty than to maintain . . . [the writ of habeas corpus] unimpaired," *Bowen v. Johnston*, 306 U.S. 19, 26 (1939), and unsuspended . . . ' *Smith v. Bennett*, 365 U.S. 708, 713 (1961)," *Fay v. Noia*, 372 U.S. 391, 400 (1963).

To effectuate the purpose of the writ of habeas corpus—the vindication of the right to freedom from restraints in violation of fundamental law—the federal habeas courts must have the use of those procedural tools that are necessary and proper to maintain effective inquiry into the legality of a petitioner's detention. Because both the substantive constitutional guarantees that may make a detention unlawful and the corresponding scope of the writ of habeas corpus have expanded greatly beyond their origins—and most particularly within the past thirty years—evidentiary hearings are today essential to the performance of the constitutional office of the writ. In turn, an adequate battery of pretrial devices for the effective discovery, preparation and presentation of factual matters at the evidentiary hearing is the indispensable precondition of its effectiveness. Deprivation of effective hearing on a claim works the substantial denial of the claim and affronts the constitutional guarantee that is its basis. E.g., *Commonwealth ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956); *Coleman v. Alabama*, 377 U.S. 129, 133 (1964). These considerations add a grave concern of constitutional dimension to the interests of practicality and efficient judicial administration (Part I of this Brief) that the decision of the Ninth Circuit threatens to impair.

As shown in Part II of the Brief, a practical reading of Federal Civil Rule 81(a)(2) is available which avoids the twin dangers of leaving federal habeas corpus courts unprovided with the essential resources for their vital task, and of leaving federal habeas corpus petitioners an intolerably restricted form of procedure for the vindication of their right to liberty guaranteed by the Suspension Clause. Such a reading should be given the Rule by this Court. Rule 81(a)(2) should be interpreted as making the modern procedures of the Federal Civil Rules fully and directly applicable in habeas corpus proceedings except where an aspect of habeas practice is regulated by statute or where distinctive traditional procedures unique to proceedings under the writ and differing from those in ordinary civil actions have emerged with demonstrable clarity. For these reasons, the judgment below should be reversed.

Respectfully submitted,

JACK GREENBERG

JAMES M. NABRIT, III

MICHAEL MELTSNER

JACK HIMMELSTEIN

10 Columbus Circle

New York, New York 10019

ANTHONY G. AMSTERDAM

3400 Chestnut Street

Philadelphia, Pa. 19104

*Attorneys for the N.A.A.C.P.  
Legal Defense and Educational  
Fund, Inc., and the National  
Office for the Rights of the  
Indigent*

SEP 11 1968

JOHN F. DAVIS, CL

## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District  
Court for the Northern District of California,

*Petitioner,**vs. :*

LOUIS NELSON, Warden,

*Respondent.*

## BRIEF FOR PETITIONER

J. STANLEY POTTINGER  
425 California Street  
San Francisco, California 94104

J. THOMAS ROSCH  
601 California Street  
San Francisco, California 94108

*Attorneys for Petitioner*

# INDEX

## SUBJECT INDEX

	Page
Opinion Below .....	1
Jurisdiction .....	1
Statutes and Rules Involved .....	2
Statutes .....	2
Federal Rules of Civil Procedure .....	2
Question Presented .....	4
Statement of the Case .....	4
Summary of Arguments .....	6
Argument .....	8

The District Court Below Had the Authority to Order the Use of Discovery Interrogatories Pursuant to

(A) The Mandates of *Townsend v. Sain, Brown v. Allen*, and 28 U.S.C. §2243;

(B) Its Inherent Power to Insure a Fair and Just Hearing;

(C) The "All Writs" Statute, 28 U.S.C. §1651 (a); and

(D) The Federal Rules of Civil Procedure, Rules 1 and 33 ..... 8

(A) The Mandates of *Townsend v. Sain, Brown v. Allen*, and 28 U.S.C. §2243, Requiring the District Court to Hear and Determine the Facts in an Evidentiary Hearing, Provide the Court With the Authority to Order Discovery of Facts Essential to Such a Hearing ..... 8

	Page
(B) The District Court Has the Inherent Power to Order the Use of Discovery Interrogatories in Order to Insure a Fair and Just Evidentiary Hearing .....	12
(C) The "All Writs" Statute, 28 U.S.C. §1651 (a), Provides the District Court With the Authority to Order the Use of Discovery Interrogatories in Aid of Its Habeas Corpus Jurisdiction .....	18
(D) Rules 1 and 33 of the Federal Rules of Civil Procedure Authorize the Use of Discovery Interrogatories in the District Court and, Contrary to the Decision Below, Rule 81(a)(2) Does Not Deny the Applicability of Those Rules to Habeas Corpus Proceedings .....	23
Conclusion .....	36

#### TABLE OF AUTHORITIES

##### CASES:

<i>Abel v. Tinsley</i> , 338 F.2d 514 (10th Cir. 1964) ....	28
<i>Adams v. United States</i> , 317 U.S. 269 (1942) ....	20, 22
<i>Aguilar v. Texas</i> , 378 U.S. 108 (1964) .....	11
<i>American Lithographic Co. v. Werckmeister</i> , 221 U.S. 603 (1911) .....	21
<i>Beck v. Ohio</i> , 379 U.S. 89 (1964) .....	11
<i>Bethlehem Shipbuilding Corp. v. N.L.R.B.</i> , 120 F.2d 126 (1st Cir. 1941) .....	21
<i>Bowdidge v. Lehman</i> , 252 F.2d 366 (6th Cir. 1958) .....	28
<i>Bowen v. Boles</i> , 258 F.Supp. 111 (N.D.W.Va. 1966) .....	28
<i>Brown v. Allen</i> , 344 U.S. 443 (1953) .....	6, 8, 9, 10, 19, 21, 22



	Page
<i>Cross v. Burke</i> , 146 U.S. 82 (1892) .....	23
<i>Estep v. United States</i> , 251 F.2d 579 (5th Cir. 1958) .....	21, 28
<i>Ex Parte Tom Tong</i> , 108 U.S. 556 (1883) .....	23
<i>Fay v. Noia</i> , 372 U.S. 391 (1963) .....	17-18
<i>Fisher v. Baker</i> , 203 U.S. 174 (1906) .....	23
<i>Fortner v. Balkcom</i> , 380 F.2d 816 (5th Cir. 1967) .....	24
<i>Hamilton v. Hunter</i> , 65 F.Supp. 319 (D.Kan. 1946) .....	28
<i>Hammerer v. Huff</i> , 110 F.2d 113 (D.C.Cir. 1939) .....	28
<i>Harris v. North Carolina</i> , 240 F.Supp. 985 (E.D. N.C. 1965) .....	16, 23
<i>Hunter v. Thomas</i> , 173 F.2d 810 (10th Cir. 1949) .....	28
<i>In re McShane</i> , 235 F.Supp. 262 (N.D.Miss. 1964) .....	28
<i>Kamen Soap Products Co. v. United States</i> , 110 F.Supp. 430 (Ct. Cl. 1953) .....	21
<i>Knowles v. Gladden</i> , 254 F.Supp. 643 (D.Ore. 1965) .....	16, 23, 31
<i>Kurtz v. Moffitt</i> , 115 U.S. 487 (1885) .....	23
<i>Lyles v. Beto</i> , 32 F.R.D. 248 (S.D.Texas 1963) ....	21
<i>Miner v. Atlass</i> , 363 U.S. 641 (1960) .....	15, 16, 17
<i>Molignaro v. Dutton</i> , 373 F.2d 729 (5th Cir. 1967) .....	24
<i>Olson Rug Co. v. N.L.R.B.</i> , 291 F.2d 655 (7th Cir. 1961) .....	21
<i>Price v. Johnston</i> , 334 U.S. 266 (1948) .....	20, 21
<i>Rodgers v. Bennett</i> , 320 F.2d 83 (8th Cir. 1963) .....	24
<i>Schiebelhut v. United States</i> , 318 F.2d 785 (6th Cir. 1963) .....	16, 24
<i>Shores v. United States</i> , 174 F.2d 838 (8th Cir. 1949) .....	12, 13

	Page
<i>Smith v. United States</i> , 174 F.Supp. 828 (S.D. Cal. 1959) .....	16, 24, 28, 31
<i>Stern v. South Chester Tube Co.</i> , 390 U.S. 606 (1968) .....	18, 19
<i>Sullivan v. Dickson</i> , 283 F.2d 725 (9th Cir. 1960) .....	16, 23
<i>Sullivan v. United States</i> , 198 F.Supp. 624 (S.D. N.Y. 1961) .....	14, 15
<i>Townsend v. Sain</i> , 372 U.S. 293 (1963) .....	6, 8, 9, 10, 11, 19
<i>Tribune Review Pub. Co. v. Thomas</i> , 120 F.Supp. 362 (W.D.Pa. 1954) .....	12
<i>United States ex rel. Bruno v. Herold</i> , 39 F.R.D. 570 (N.D.N.Y. 1966) .....	28
<i>United States ex rel. Tillery v. Cavell</i> , 294 F.2d 12 (3rd Cir. 1961) .....	28
<i>United States ex rel. Seals v. Wiman</i> , 304 F.2d 53 (5th Cir. 1962) .....	16, 24
<i>United States v. Murray</i> , 297 F.2d 812 (2d Cir. 1962) .....	14
<i>United States v. Nolte</i> , 39 F.R.D. 359 (N.D.Cal. 1965) .....	13
<i>United States v. Pete</i> , 111 F.Supp. 292 (D.D.C. 1953) .....	14
<i>United States v. Rothman</i> , 179 F.Supp. 935 (W.D.Pa. 1959) .....	14
<i>United States v. Taylor</i> , 25 F.R.D. 225 (E.D. N.Y. 1960) .....	13, 14
<i>United States v. Wallace</i> , 222 F.Supp. 485 (M.D. Ala. 1963) .....	19
<i>United States v. Williams</i> , 37 F.R.D. 24 (S.D. N.Y. 1965) .....	14
<i>Wilson v. Harris</i> , 378 F.2d 141 (9th Cir. 1967) .....	1, 6, 29

## TABLE OF STATUTES AND RULES

	Page
28 U.S.C. §1651(a) .....	2, 6, 7, 8, 18, 20, 21
28 U.S.C. §§2241-2255 .....	19, 23
28 U.S.C. §2243 .....	2, 6, 8, 10, 17
Fed. R. Civ. P.	
Rule 1 .....	2, 7, 8, 23
Rule 12(c) .....	27
Rule 15(a) .....	27
Rule 26 .....	16, 23
Rule 30 .....	23, 31
Rule 33 .....	2, 5, 7, 8, 23, 24, 29
Rule 35 .....	24, 31
Rules 47-51 .....	34
Rule 81(a)(1) .....	16, 17
Rule 81(a)(2) .....	4, 5, 7, 8, 23, 24, 25, 27, 28, 29, 30, 31, 33, 34, 35
Rule 81(b) .....	19
Equity Rule 58 .....	31, 32
General Admiralty Rules .....	16

## TABLE OF ARTICLES AND TREATISES

Bator, Paul M. "Finality In Criminal Law and Federal Habeas Corpus For State Prisoners," 76 Harv. L. Rev. 441 .....	34
Black, Law Dictionary (4th ed. 1951) .....	30
Carter, Hon. James M. "Pre-Trial Suggestions for Section 2255 Cases," 32 F.R.D. 393 (1963) .....	24
Church, William S., <i>A Treatise on the Writ of Habeas Corpus</i> (2d ed. 1893) .....	34
Hammond, E. "Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure," 23 A.B.A.J. 629 (1937) .....	26

	Page
Hurd, Rollin C., <i>A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus</i> (2d ed. 1876) .....	27
Kaufman, Hon. Irving R. "Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts," 57 Colum. L. Rev. 1113 (1957) ....	14
Moore and Garfinkel, 4 <i>Moore's Federal Practice</i> (2d ed. 1967) .....	32
Note, "Civil Discovery in Habeas Corpus," 67 Colum. L. Rev. 1296 (1967) .....	23, 27
Note, "Multi-party Federal Habeas Corpus," 81 Harv. L. Rev. 1482 (1968) .....	27

#### TABLE OF LEGISLATIVE HISTORY

<i>Advisory Comm. on Rules for Civil Procedure, Preliminary Draft 3 as Revised</i> , draft Rule 90(a) (Feb. 20, 1937) .....	27
<i>Advisory Comm. on Rules for Civil Procedure, Report</i> , draft Rule 83(a)(2) (April 1937) .....	27
Fed. R. Civ. P. 81(a), Explanatory Note, 43 F.R.D. 164 (1968) .....	25

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1968**

**No. 199**

---

**GEORGE B. HARRIS, Judge of the United States District  
Court for the Northern District of California,**

*Petitioner,*

*vs.*

**LOUIS NELSON, Warden,**

*Respondent.*

---

**BRIEF FOR PETITIONER**

---

**Opinion Below**

The opinion of the Court of Appeals is reported at 378  
F. 2d 141. (A 40)

**Jurisdiction**

This Court has jurisdiction under 28 U.S.C. §1254(a),  
having issued a writ of certiorari to the United States  
Court of Appeals for the Ninth Circuit in this matter on  
June 17, 1968.



## **Statutes and Rules Involved**

### **STATUTES**

28 U.S.C. §2243 (final paragraph): "The court [in habeas corpus] shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

28 U.S.C. §1651(a):

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

### **FEDERAL RULES OF CIVIL PROCEDURE**

#### **Rule 1:**

"These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

#### **Rule 33:**

"Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within

10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule."

**Rule 81(a)(2):**

"In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States. The requirements of Title 28, U.S.C. § 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force."

**Question Presented**

Is a United States district court judge without jurisdiction to order discovery by way of written interrogatories in habeas corpus proceedings?

**Statement of the Case**

On August 9, 1963, Alfred Walker, the petitioner in the habeas corpus action which gives rise to the present controversy, was arrested by the Oakland, California police for alleged illegal possession of marijuana. The arrest was made solely on the basis of information supplied to the arresting officers by an informer, one Frances Jenkins. An arrest warrant was neither sought nor obtained. Nor did the police investigate or corroborate the informer's story. (A 11)

On September 18, 1963, a preliminary hearing concerning the alleged violation was held, and petitioner Walker

was ordered to answer for the allegations. On December 4 and 5, 1963, he was tried for and convicted of possession of marijuana for sale.

Following an exhaustion of other remedies, on November 22, 1965, petitioner Walker filed for a writ of habeas corpus in the United States District Court for the Northern District of California, contending, *inter alia*, that his arrest and the search of his premises without warrant were unconstitutional because they were not made upon probable cause. On August 5, 1966, petitioner Walker moved for an evidentiary hearing to determine whether his arrest and the search were made upon probable cause and, more specifically, whether informer Jenkins was reliable or whether the arresting officers could reasonably have considered her information reliable. This motion was granted on August 15, 1967. (A 33)

On October 21, 1966, petitioner Walker propounded interrogatories, in a form consonant with Rule 33 of the Federal Rules of Civil Procedure, inquiring into the number of occasions prior to his arrest that the arresting officers had acted on information supplied by informer Jenkins and the reliability of her information on each such occasion. (R 18-20) (A 34) On October 21, 1966, upon motions duly made and arguments heard, the District Court entered an order denying objections to these interrogatories and requiring answers to them. (R 25) (A 39)

On October 26, 1966, the Attorney General for the State of California filed an application with the Court of Appeals for the Ninth Circuit for leave to petition for writ of mandamus and/or prohibition, and such leave was granted. (R 2) On May 10, 1967, the Circuit Court granted the writ

and vacated the District Court order requiring answers to the interrogatories. *Wilson v. Harris*, 378 F.2d 141 (9th Cir. 1967). It held that the District Court was without power to make such an order because neither Federal Rule of Civil Procedure 81(a)(2), nor any other power of the District Court, authorized the use of interrogatories for discovery purposes in habeas corpus proceedings.

### Summary of Arguments

Argument (A): *Townsend v. Sain*, 372 U.S. 293 (1963), *Brown v. Allen*, 344 U.S. 443 (1953), and 28 U.S.C. §2243 establish the power and duty of the district courts to hold evidentiary hearings to inquire into the facts with respect to constitutional issues raised in habeas corpus proceedings. Implicit in this power and duty is the authority of the courts to employ discovery techniques when, as in the habeas corpus proceeding below, they are necessary to make such evidentiary inquiries meaningful.

Argument (B): In addition to their procedural powers derived from federal statutes and the decisions of this Court, the district courts possess the inherent power to fashion their rules of procedure "to promote the orderly and expeditious administration of justice." Such inherent power has frequently been held to authorize the issuance of discovery orders where, as here, it is plainly in the interests of justice to do so. The decision of the Court of Appeals below abrogating such power is absolutely without precedent.

Argument (C): District courts possess the power under 28 U.S.C. §1651(a), the All Writs Statute, to issue "all writs necessary or appropriate in aid of their respective



jurisdictions and agreeable to the usages and principles of law." The discovery order of the District Court below meets the requirements of this provision. Directed as it is to a public official, the order is a form of the writ of mandamus. Furthermore, it is a form of exercise of the Court's power to issue subpoenas ad testificandum and duces tecum, which are "writs" under section 1651(a). The order has been issued in aid of the Court's existing habeas corpus jurisdiction. Finally, as an instrument "designed to achieve the rational ends of law," the order is agreeable to the usages and principles of law.

Argument (D): Rule 1 of the Federal Rules of Civil Procedure authorizes the use of discovery interrogatories conforming to Rule 33. Under Rule 1, all the Federal Rules are applicable to "all suits of a civil nature" except as otherwise provided in Rule 81. Habeas corpus has traditionally been considered a "suit of a civil nature," and the rules are therefore applicable to such a proceeding except insofar as they are made inapplicable by Rule 81.

Rule 81 does not preclude application of Rule 33 to habeas corpus proceedings. Respondent's contention that Rule 81 (a)(2) makes all the Federal Rules inapplicable to habeas corpus is contrary to the language of that provision, to its legislative history, and to its interpretation by the federal courts. The interpretation of that provision by the Court of Appeals below to require petitioner to produce a reported use of discovery interrogatories prior to 1938 as a prerequisite to use of Rule 33 today is likewise inconsistent with the statutory language of Rule 81 (a)(2), with any reasonable construction of the intent of its framers, and with prevailing authority.

Properly interpreted, Rule 81 (a)(2) makes inapplicable only those rules providing specific procedures which were unsuitable for use in habeas corpus "practice"—that is, the general form of a habeas corpus proceeding—as that proceeding existed at the time the rules were enacted. The discovery procedure provided by Rule 33 was suitable for use in a pre-1938 habeas corpus proceeding, and consequently is not made inapplicable by Rule 81.

### ARGUMENT

The District Court Below Had the Authority to Order the Use of Discovery Interrogatories Pursuant to

(A) The Mandates of *Townsend v. Sain*, *Brown v. Allen*, and 28 U.S.C. §2243;

(B) Its Inherent Power to Insure a Fair and Just Hearing;

(C) The "All Writs" Statute, 28 U.S.C. §1651(a); and

(D) The Federal Rules of Civil Procedure, Rules 1 and 33.

(A) THE MANDATES OF *TOWNSEND V. SAIN*, *BROWN V. ALLEN*, AND 28 U.S.C. §2243, REQUIRING THE DISTRICT COURT TO HEAR AND DETERMINE THE FACTS IN AN EVIDENTIARY HEARING, PROVIDE THE COURT WITH THE AUTHORITY TO ORDER DISCOVERY OF FACTS ESSENTIAL TO SUCH A HEARING.

A decade and a half ago this Court affirmed the existing power of a federal district court in a habeas corpus proceeding to hold a trial of fact to inquire into federal constitutional issues raised by a petitioner. *Brown v. Allen*,

344 U.S. 443 (1953). At that time, the Court declared that discovery techniques available in ordinary civil actions could be employed in preparation for such a trial:

"28 U.S.C. §2245 allows a certificate as to certain facts; section 2246 provides for depositions and affidavits. Section 2247 makes liberal provision for the use of records of former proceedings in evidence. See also sections 2248-2254, inclusive. *Of course, the other usual methods of completing the record in civil cases, such as subpoena duces tecum and discovery, are generally available to the applicant and respondent.*" (344 U.S. at 464, n. 19) (Emphasis added).

Ten years later, in *Townsend v. Sain*, 372 U.S. 293 (1963), this Court held that evidentiary hearings were under certain circumstances not only permissible, but mandatory:

"We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." (372 U.S. at 313).

At the same time, the Court also reaffirmed the power of a district court to order discovery of facts material to such hearings. "The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary." (372 U.S. at 312).

The Court's declarations in *Brown v. Allen* and *Townsend v. Sain* confirming the discovery powers of a district court recognize that without such powers most evidentiary hearings, instead of providing constitutional safeguards against unjust imprisonment, would be nothing more than empty exercises. The mandates of these cases and of the statutory direction to the Court to "hear and determine the facts" (28 U.S.C. §2243) do not presuppose that the facts essential to such hearings will materialize magically before the trial court. In many cases, essential facts are inaccessible and can be obtained only with the aid of appropriate discovery orders. Even with regard to accessible facts, most habeas corpus petitioners are not able to utilize ordinary methods of investigation and preparation of their cases. They are precluded by their incarceration from gathering facts personally; many, including petitioner Walker, are prevented by their indigency from retaining others to do such work. The power to order the use of such devices is, in short, an integral component of the duty and power of a district court to hold the meaningful evidentiary hearings required by *Townsend v. Sain* and section 2243. The order of the District Court below compelling answers to petitioner Walker's interrogatories was simply an exercise of this power.

The propriety of the Court's order to hold an evidentiary hearing is beyond dispute. The record revealed that peti-



tioner Walker was arrested and his premises searched solely on the basis of information provided by an informant. As such, the arrest and search were constitutionally permissible only if the informant was reliable and the arresting officers had reason to believe the information provided. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Beck v. Ohio*, 379 U.S. 89 (1964). Petitioner Walker's state court record, along with newly discovered evidence (A 13-17) created grave doubt as to the reliability of the informer and the reasonableness of the arresting officers' reliance upon her. The facts bearing on these issues of reliability and reasonableness were not adequately developed at trial. (A 19-22) Indeed, despite the efforts of petitioner Walker's attorney, the informer was not even produced at trial. Therefore, under the standards set forth in *Townsend v. Sain*, there was a "substantial allegation of newly discovered evidence", and it was apparent that "the material facts were not adequately developed at the state court hearing." *Townsend v. Sain*, 372 U.S. 293, 313 (1963). Under these circumstances, the District Court was required to hold an evidentiary hearing.

The discovery order issued by the District Court is an essential step in fulfilling this requirement. The interrogatories inquire directly into the issues of the reliability of the informer's story and reasonableness of reliance upon it. As such, they go directly to the constitutional issues requiring the evidentiary hearing itself. Without the information requested by the interrogatories, it will be virtually impossible for petitioner Walker or his counsel to prepare for the resolution of the constitutional issues on which the disposition of Walker's hearing—and liberty—depend. Only through such interrogatories will petitioner



Walker be able to anticipate the necessity for rebuttal evidence, and to prepare for possible impeachment of Respondent's witnesses. Only through such interrogatories can surprise to the parties and the Court be avoided, and litigation of the issues proceed on the basis of fact rather than speculation. In sum, only through such interrogatories can the District Court discharge its duty under *Townsend v. Sain* to hold a fair and meaningful evidentiary hearing.

(B) THE DISTRICT COURT HAS THE INHERENT POWER TO ORDER THE USE OF DISCOVERY INTERROGATORIES IN ORDER TO INSURE A FAIR AND JUST EVIDENTIARY HEARING.

Apart from its powers derived from federal statute and decisions of this Court, the District Court below also possesses a more general power inherent in its duty to effect the ends of justice:

"Even in the absence of any statutory provision or regulation, courts have inherent power to make their own rules of practice and procedure to facilitate the business of the court and to promote the orderly and expeditious administration of justice for the benefit of the parties as well as for the benefit of the court." *Tribune Review Pub. Co. v. Thomas*, 120 F.Supp. 362, 371 (W.D. Pa. 1954).

Such inherent power has been the basis for numerous orders by the federal courts, including discovery orders similar to the one presently in issue. In *Shores v. United States*, 174 F.2d 838 (8th Cir. 1949), the Court, although declining to order discovery of a copy of a confession, expressly declared that it had the power to make such an order:

"We think that such a power of control over a confession and its use does exist in a judicial proceeding, as part of the inherent nature and dignity of our system of administering criminal law, and that even without any rule or statute, therefore, the court is not powerless to require the Government to furnish the defendant with a copy of his confession, if the Government intends to use it as evidence on the trial and where the court deems it necessary in the interest of justice that the defendant should be furnished with a copy." (174 F.2d at 845).

In *United States v. Nolte*, 39 F.R.D. 359 (N.D. Cal. 1965), the Court similarly found that in the absence of any rule or statute to the contrary, the Court retained the inherent power to enter an order permitting the defendant to discover a tape recording bearing directly upon his case. In *United States v. Taylor*, 25 F.R.D. 225 (E.D.N.Y. 1960), the Court reviewed briefly the tradition of the judiciary's inherent power to order discovery and concluded that without statutory contradiction such inherent power remained intact:

"I doubt that the rules [of Criminal Procedure], although a comprehensive regulation of federal criminal procedure, entirely supplant the residual power of the Court. I doubt the advisability of reading an imaginative implication into Rule 16 that would deprive the Court of its inherent power, shut off the development of discovery by adjudication and thus freeze its limits along the lines determined by cases which had been decided when the rules were formulated. In my view, to the extent that Rule 16 does not express a policy prohibiting discovery not explicitly

authorized by the rules, the Court is free, either by local rule or by adjudication, to permit discovery on the basis of its inherent power." (25 F.R.D. at 228).

And, in *United States v. Williams*, 37 F.R.D. 24 (S.D.N.Y. 1965), the Court held that discovery of a relevant interview with a government attorney was an appropriate exercise of its inherent power, and entered its order accordingly. See also: *United States v. Murray*, 297 F.2d 812 (2d Cir. 1962), cert. denied 369 U.S. 828 (1962); *United States v. Rothman*, 179 F.Supp. 935 (W.D. Pa. 1959); *United States v. Peté*, 111 F.Supp. 292 (D.D.C. 1953); Hon. Irving R. Kaufman, "Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts," 57 Colum. L. Rev. 1113, 1121 (1957). That these cases are criminal rather than civil in nature is irrelevant. Because the Court's inherent power stems from its fundamental duty to determine the truth in all proceedings before it, such power exists in criminal and civil cases alike.

With specific reference to the exercise of inherent discovery powers in habeas corpus proceedings, in only one reported instance prior to the decision of the Court of Appeals below did a federal court refuse to authorize the use of a discovery device. *Sullivan v. United States*, 198 F.Supp. 624 (S.D.N.Y. 1961). Even in that instance, however, the Court did not doubt its inherent power to order discovery when justified, and specifically stated that it had granted such discovery on prior occasions:

"We, too, granted discovery of certain specified medical records heretofore sought by petitioner herein on a motion pursuant to Rule 34 of the Civil Rules which was virtually consented to by the government, and

*which we felt justified in ordering, primarily as an exercise of the inherent power of the court, and not because we agreed with the appellation that this is a 'civil case' to which the Civil Rules apply."* (198 F. Supp. at 626) (Emphasis added).

The effect of the decision of the Court of Appeals below is to abrogate the inherent discovery power of the District Court. As such, that decision is absolutely without precedent.

The Court of Appeals cites no precedent for its decision, and the only precedent suggested by Respondent is his reference to the case of *Miner v. Atlass*, 363 U.S. 641 (1960). (Response in Opposition to Petition for Writ of Certiorari, p. 26; hereafter "Response") In that case, the Court decided that a district court, sitting in admiralty, did not have the power to order the taking of oral depositions for discovery purposes only. In so deciding, the Court was careful to state that its decision was confined strictly to the use of discovery *depositions*, and more particularly the use of those depositions in *admiralty*:

"We deal here only with the procedure before us, and our decision is based on its particular nature and history." (363 U.S. at 649).

The considerations which led the Court to conclude that such depositions could not be used in admiralty proceedings have no application to the case at bar.

First, the Court found no indication that district courts had ever before ordered discovery depositions in admiralty proceedings. Citing the statement by Benedict on Admiralty that "[a]n admiralty deposition may only be

taken for the purpose of securing evidence, it may not be taken for the purpose of discovery", the Court commented that "This statement by a leading work in the field hardly bespeaks the existence of traditional inherent power, and we find none." (363 U.S. at 644).

No such barrier exists in the present case, for the use of interrogatories and other discovery tools in habeas corpus is well established. See *Knowles v. Gladden*, 254 F. Supp. 643, 644-45 (D. Ore. 1965), *aff'd*, 378 F.2d 761 (9th Cir. 1967) and *Sullivan v. Dickson*, 283 F.2d 725, 727 (9th Cir. 1960), *cert. denied* 366 U.S. 951 (1961) (dictum) (Depositions upon oral examination); *Harris v. North Carolina*, 240 F.Supp. 985, 989-990 (E.D.N.C. 1965) and *Schiebelhut v. United States*, 318 F.2d 785-86 (6th Cir. 1963) (Written interrogatories); *Smith v. United States*, 174 F.Supp. 828, 830 (S.D. Cal. 1959), *appeal dismissed*, 272 F.2d 228 (9th Cir. 1959), *cert. denied* 362 U.S. 954 (1960) (Compulsory mental examination); *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 63-64 (5th Cir. 1962) (Request for Admissions).

Second, the Court in *Miner* was concerned about Rule 81(a)(1) of the Federal Rules of Civil Procedure and the legislative history of the General Admiralty Rules, both of which revealed a clear intent to exclude discovery depositions from admiralty proceedings. At the time *Miner* was decided, Rule 81(a)(1) of the Federal Rules of Civil Procedure flatly provided that "these rules [including the rules providing for discovery depositions] do not apply to proceedings in admiralty." In addition, although several of the Federal Civil Rules were incorporated into the General Admiralty Rules, Civil Rule 26 relating to discovery depositions was conspicuously omitted. The Court stated: "We



cannot of course regard this significant omission as inadvertent, [citation]; rather, it goes far to establish the lack of any provision for discovery by deposition in the General Admiralty Rules." (363 U.S. at 645).

Insofar as habeas corpus is concerned, there is nothing in the Federal Rules similar to the absolute bar applied to admiralty by Rule 81(a)(1). On the contrary, the discovery provisions in the Federal Rules are made applicable to habeas corpus under a correct interpretation of the Rules. (See *infra* pp. 33-35). Nor is there any legislative history akin to that of the General Admiralty Rules disclosing a desire to preclude the use of discovery interrogatories in habeas proceedings. (See *infra* pp. 26-27).

Third, particularly in view of Rule 81(a)(1) and the legislative history of the General Admiralty Rules, the Court in *Miner* was reluctant to extend to admiralty a procedure so novel and innovative as discovery depositions upon oral examination. The Court stated that "[d]iscovery by deposition is at once more weighty and more complex" than other procedures. (363 U.S. at 649). Discovery by deposition is not at issue in the present case. Discovery interrogatories are at issue, and are not the least bit novel. As demonstrated below (*infra* pp. 31-32), they have been used in the federal courts since at least 1912.

Finally, in dealing with admiralty the Court was not addressing itself to a proceeding governed, as habeas corpus is governed, by the overriding dictates of "law and justice" (28 U.S.C. §2243). It was not speaking of the procedures which might be employed in aid of "the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement." *Fay v. Noia*,

372 U.S. 391, 400 (1963). Absent explicit statutory restrictions of a sort which do not exist here, the inherent power of the District Court to employ discovery interrogatories in the habeas corpus proceeding below should not, and properly cannot, be impaired.

(C) THE "ALL WRITS" STATUTE, 28 U.S.C. §1651(a), PROVIDES THE DISTRICT COURT WITH THE AUTHORITY TO ORDER THE USE OF DISCOVERY INTERROGATORIES IN AID OF ITS HABEAS CORPUS JURISDICTION.

The discovery order of the District Court below is authorized by 28 U.S.C. §1651(a), popularly known as the All Writs Statute:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

To qualify under this provision, an order must meet three tests: (1) It must be a "writ"; (2) it must be issued in aid of the court's independently existing jurisdiction; and (3) it must be agreeable to the usages and principles of law.

The order of the District Court below is in the nature of a writ of mandamus. Like that writ, the order directing the Respondent to answer petitioner Walker's interrogatories is an order commanding a public official to perform a duty. *Stern v. South Chester Tube Co.*, 390 U.S. 606, 608 (1968).<sup>\*</sup> The fact that the order is not designated a

---

<sup>\*</sup> The order of the District Court reads as follows:

"It is ORDERED that Respondent's objections are denied, and that Respondent shall answer said interrogatories on or before October 26, 1966." (R 25) (A 46).

writ of mandamus is of no consequence. The abolition of the writ of mandamus as so denominated (Rule 81(b), Fed. R. Civ. P.) would make such a form impossible. And, in any event, it is clear that orders of a district court may be considered "writs" under the All Writs Statute. *Stern v. South Chester Tube Co.*, 390 U.S. 606 (1968); *United States v. Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963). Thus, the order of the District Court below qualifies under the statute so long as it meets the other requirements of the Act.

With respect to the requirement that the order issue in aid of the court's jurisdiction, it is beyond dispute that the District Court has independent habeas corpus jurisdiction, 28 U.S.C. §§2241-2255; *Brown v. Allen*, 344 U.S. 443 (1953); *Townsend v. Sain*, 372 U.S. 293 (1963), and that the discovery order in question was issued in aid of that jurisdiction.

As for the requirement that such orders issue "according to the usages and principles of law," the question arises as to whether this language requires an order to conform precisely to the writ it simulates, issuing only in circumstances identical to those in which the writ would issue at common law; or whether this provision permits an order to conform with some flexibility to its common law counterpart, issuing in circumstances akin to—but not absolutely identical to—those at common law. With specific reference to the present case, the question is whether the discovery order below can issue only if it commands a public officer to perform a separately existing "ministerial" duty, as did the order in an original proceeding for mandamus at common law, or whether it is sufficient that the order compels such an officer to perform an official act, as does the order below.

The Court has answered this question. In *Price v. Johnston*, 334 U.S. 266 (1948), the petitioner, a prisoner, sought a writ of habeas corpus under the All Writs Statute for the purpose of personally arguing his case to the Court of Appeals. The Supreme Court recognized that no writ existed for such a purpose at common law, but nonetheless found that issuance of a modified writ to accomplish such a purpose was "agreeable to the usages and principles of law," and was therefore authorized by the All Writs Act:

"[W]e do not conceive that a circuit court of appeals, in issuing a writ of habeas corpus under §262 of the Judicial Code [citation to predecessor of 28 U.S.C. §1651(a)] is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. Section 262 says that the writ must be agreeable to the usages and principles of 'law,' a term which is unlimited by the common law or the English law. And since 'law' is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the habeas corpus writ authorized by §262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. In short, we do not read §262 as an ossification of the practice and procedure of more than a century and a half ago. Rather it is a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.' *Adams v. United States* [317 U.S. 273]." (334 U.S. at 282)

The order of the District Court below does not differ from the traditional writ of mandamus to any greater extent than the order authorized by this Court in *Price v. Johnston* differed from the traditional writ of habeas corpus. Like the order in *Price v. Johnston*, it is a "procedural instrument designed to achieve 'the rational ends of law.'" As such, it fully conforms to the requirements of section 1651(a).

The discovery order below may be equally sustained under the All Writs Statute as a form of exercise of the subpoena powers of the District Court. It has long been established that subpoenas ad testificandum and subpoenas duces tecum are authorized by the All Writs Act, *American Lithographic Co. v. Werckmeister*, 221 U.S. 603, 609 (1911) and may be specifically employed for the purposes of pretrial discovery. *Bethlehem Shipbuilding Corp. v. N.L.R.B.*, 120 F.2d 126 (1st Cir. 1941); *Olson Rug Co. v. N.L.R.B.*, 291 F.2d 655, 658 (7th Cir. 1961); *Kamen Soap Products Co. v. United States*, 110 F.Supp. 430 (Ct. Cl. 1953). It is also clear that the subpoena powers are available to the district courts in habeas corpus proceedings. *Brown v. Allen*, 344 U.S. 443 (1953); *Estep v. United States*, 251 F.2d 579, 581 (5th Cir. 1958); *Lyles v. Beto*, 32 F.R.D. 248 (S.D. Texas 1963).

The discovery order of the District Court is essentially a streamlined and economic use of these existing subpoena powers: the Court could have issued subpoenas ad testificandum and duces tecum to the arresting officers and, through a limited pretrial hearing, secured precisely the same information requested by the interrogatories. Indeed, the Court in *Brown v. Allen* anticipated the possible need



for such a procedure and provided for its employment.\* The order compelling Respondent to answer interrogatories simply eliminates the burdens of a double hearing and obviates the need for undue consumption of the Court's calendar and the time of the witnesses and counsel. It avoids the expense of a double hearing—expense which may be prohibitive to an indigent habeas corpus petitioner—and removes the risk of obtaining incomplete information inherent in taking discovery at one sitting rather than at the witness' convenience over a reasonable period of time. The order authorizing use of interrogatories, in short, is a streamlined and desirable form of the Court's existing subpoena powers. As this Court has said in construing the scope and flexibility of the All Writs Statute, "dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." *Adams v. United States*, 317 U.S. 269, 274 (1942). To deny the modified use of the Court's subpoena powers in the present case would merely pay tribute to dry formalism and result in a derogation of the Great Writ itself. Nothing in the All Writs Act or any other statute would justify such a result.

---

\* After noting that "subpoena duces tecum and discovery, are available" in habeas corpus, the Court added:

"If useful records of prior litigation are difficult to secure or unobtainable, the District Court may find it necessary or desirable to hold limited hearings to supply them where the allegations of the application for habeas corpus state adequate grounds for relief." (344 U.S. at 464, n. 19).

(D) RULES 1 AND 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE AUTHORIZE THE USE OF DISCOVERY INTERROGATORIES IN THE DISTRICT COURT AND, CONTRARY TO THE DECISION BELOW, RULE 81(a)(2) DOES NOT DENY THE APPLICABILITY OF THOSE RULES TO HABEAS CORPUS PROCEEDINGS.

The scope of application of the Federal Rules of Civil Procedure is defined by Rule 1 as follows:

"These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81."

As Respondent concedes, "habeas corpus has always been considered in the nature of a civil proceeding" (Response p. 18). See *Fisher v. Baker*, 203 U.S. 174, 181 (1906); *Cross v. Burke*, 146 U.S. 82, 88 (1892); *Kurtz v. Moffitt*, 115 U.S. 487, 494 (1885); *Ex Parte Tom Tong*, 108 U.S. 556, 559 (1883); see Note, "Civil Discovery in Habeas Corpus," 67 Colum. L. Rev. 1296, 1298 (n. 14) (1967). Accordingly, the federal district courts and courts of appeal, including the Ninth Circuit, have authorized the use in habeas corpus proceedings (or in proceedings under 28 U.S.C. §2255 which are in the nature of habeas corpus proceedings) of all except one of the discovery devices in the Federal Rules of Civil Procedure [production of documents (Rule 34)]. Depositions upon oral examination (Rules 26 and 30) were used or authorized to be used in *Knowles v. Gladden*, 254 F.Supp. 643, 644-45 (D. Ore. 1965), *aff'd*, 378 F.2d 761 (9th Cir. 1967) and *Sullivan v. Dickson*, 283 F.2d 725, 727 (9th Cir. 1960), *cert. denied* 366 U.S. 951 (1961) (dictum). Depositions upon written interrogatories (Rule 31) were

authorized and used in *Molignaro v. Dutton*, 373 F.2d 729 (5th Cir. 1967) and *Fortner v. Balkcom*, 380 F.2d 816 (5th Cir. 1967), respectively. Written interrogatories (Rule 33), which petitioner Walker seeks to employ here, were used or authorized to be used in *Harris v. North Carolina*, 240 F.Supp. 985, 989-90 (E.D.N.C. 1965) and *Schiebelhut v. United States*, 318 F.2d 785, 786 (6th Cir. 1963). Compulsory mental examination (Rule 35) was employed in *Smith v. United States*, 174 F.Supp. 828, 830 (S.D.Cal. 1959), *appeal dismissed*, 272 F.2d 228 (9th Cir. 1959), *cert. denied*, 362 U.S. 954 (1960). Requests for admissions (Rule 36) were used in *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 63-64 (5th Cir. 1962). And the discovery rules as a whole were authorized for use in *Rodgers v. Bennett*, 320 F.2d 83 (8th Cir. 1963) (dictum). See also Hon. James M. Carter, "Pre-Trial Suggestions For Section 2255 Cases," 32 F.R.D. 393, 396 (1963).

Both Respondent (Response pp. 10-18) and the decision of the Court of Appeals below (378 F.2d 141 at 143-44) contend, however, that petitioner Walker's use of discovery interrogatories, which comply in all respects with Federal Rule 33, is absolutely barred by Rule 81(a)(2). During the proceedings below, Federal Rule 81(a)(2) read in pertinent part as follows:

"In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States."

It has since been amended to read:

"These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions."\*

Respondent, the Court of Appeals below, and Petitioner have each construed Rule 81(a)(2) in a different fashion.

1. *Respondent's Interpretation.* Respondent interprets Rule 81(a)(2) to mean that *none* of the Federal Rules are appropriate in habeas proceedings, "except on appeal." (Response p. 11). This is said to be apparent from the language of the provision, more particularly from the phrase "but they [the Rules] are not applicable otherwise than on appeal" in the original version (Response p. 11), and from what Respondent terms its "genealogy" (Response p. 13).

Far from supporting Respondent's interpretation, the language of Rule 81(a)(2) (in both its original and amended forms) is fatal to it. The original version explicitly stated that the Rules *were* applicable to habeas otherwise than on appeal "to the extent that" certain conditions discussed below exist (*infra* pp. 29-35). The amended version expressly provides that "[T]hese rules *are applicable* to proceedings for . . . habeas corpus . . ." (emphasis added) to the extent the same conditions are satisfied. Respondent's contention that the provision operates to exclude the Rules

---

\* The stated purpose of this amendment was to "eliminate inappropriate references to appellate procedure", Fed. R. Civ. P. 81(a), Explanatory Note, 43 F.R.D. 164 (1968), and it does not alter the issue regarding the statute's interpretation presently before the Court.

*in toto* from habeas thus cannot be reconciled with the language of the provision in its entirety.

Nor does the so-called "genealogy" of the provision upon which Respondent relies support such an interpretation. In the first place, that genealogy consists not of any true legislative history, but merely of informal remarks of three individuals who were connected with the Advisory Committee on Federal Rules. (Response pp. 12-15). Moreover, the actual remarks of two of these individuals were significantly different from those attributed to them by Respondent. Edward H. Hammond, for example, did not state that "the final draft excluded habeas corpus," as Respondent quotes him as saying. (Response p. 12). He stated that:

"The applicability or non-applicability of the rules to the extraordinary legal remedies, such as habeas corpus and quo warranto, and to certain statutory proceedings, not mentioned in the old rule on applicability of the rules (Rule 90) is stated in the new rule. (Rule 82)." E. Hammond, "Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure," 23 A.B.A.J. 629, 634 (1937).

And, contrary to Respondent's assertion, Edgar B. Tolman did not advise the Committee of the Judiciary for the House of Representatives that the Rules "apply [only] to appeals with regard to . . . habeas corpus . . ." (Response pp. 13, 15). The author did not use the crucial word "only," which alters the entire meaning of the phrase; he simply stated that "they apply to appeals with regard to . . . habeas corpus . . ." *Hearings on H.R. 8892 Before the House Comm. on the Judiciary, 75th Cong., 3d Sess., at 130*



(1938). The informal remarks of the third individual, William D. Mitchell (Response p. 13), are now generally considered to have been inaccurate. Note, "Multi-party Federal Habeas Corpus," 81 Harv. L. Rev. 1482, 1495 (n. 100) (1968); Note, Civil Discovery In Habeas Corpus," 67 Colum. L. Rev. 1296, 1298 (n. 16) (1967).

What true legislative history of the provision exists is squarely against Respondent. The first time habeas corpus was mentioned in any draft was in a draft of February 20, 1937. It specified that except for appeals, to which the rules would be applicable, habeas corpus would be governed exclusively by existing statutes. *Advisory Comm. on Rules for Civil Procedure, Preliminary Draft 3 as Revised*, draft Rule 90(a) (Feb. 20, 1937). Had such a provision been enacted it would have provided the blanket exclusion for which Respondent contends. But it was not. It was deleted from the draft of April 30, 1937 in favor of a provision nearly identical to Rule 81(a)(2) which was ultimately enacted. *Advisory Comm. on Rules for Civil Procedure, Report*, draft Rule 83(a)(2) at 206, 210-12 (April 1937). In short, the legislative history of the provision suggests that the framers made a deliberate decision *not* to exclude the Rules altogether from habeas corpus.

Common sense compels the same conclusion. Certain procedures embodied in the Rules, such as amendment of pleadings upon a showing of cause [Rule 15(a)] and motions for judgment on the pleadings [Rule 12(c)], had been employed in habeas corpus proceedings long before 1937. Rollin C. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus*, pp. 257, 289-90 (2d ed. 1876). A provision which operates, as Respondent suggests that Rule 81(a)(2) operates, to exclude all the Rules

from habeas corpus "except on appeal" would render all the traditional procedures mentioned in the Rules unavailable simply *because* they are in the Rules. It is most improbable that the framers intended such a bizarre result.

Respondent's interpretation is also squarely in conflict with more than a dozen prior federal cases. It cannot be reconciled, of course, with the cases discussed above in which the various Rules covering discovery procedures have been employed. Nor can it be reconciled with numerous cases from five Circuits in which other Rules have been used. *United States ex rel. Tillery v. Cavell*, 294 F.2d 12, 18 (3d Cir. 1961), *cert. denied*, 370 U.S. 945 (1962) [Rule 60(a)]; *Estep v. United States*, 251 F.2d 579, 581-83 (5th Cir. 1958) [Rules 45(c) and 41(a)(1)]; *Abel v. Tinsley*, 338 F.2d 514, 516 (10th Cir. 1964) [Rule 60(b)]; *Hunter v. Thomas*, 173 F.2d 810, 812 (10th Cir. 1949) [Rule 59(a)]; *Bowdidge v. Lehman*, 252 F.2d 366, 368-69 (6th Cir. 1958) [Rules 56 and 57]; *Hammerer v. Huff*, 110 F.2d 113 (D.C. Cir. 1939) [Rule 8(a)]; *United States ex rel. Bruno v. Herold*, 39 F.R.D. 570, 572 (N.D.N.Y. 1966) *rev'd on other grounds*, 368 F.2d 187 (2d Cir. 1966) [Rule 60(b)(6)]; *Bowen v. Boles*, 258 F.Supp. 111, 113 (N.D.W.Va. 1966) [Rule 6(b)(2)]; *In re McShane*, 235 F.Supp. 262, 266 (N.D. Miss. 1964) [Rule 56]; *Hamilton v. Hunter*, 65 F.Supp. 319 (D.Kan. 1946) [Rule 15(b)]; *Smith v. United States*, 174 F.Supp. 828 (S.D.Cal. 1959) [Rule 17(c)]. Even the Court of Appeals below did not find such a blanket exclusion of the Rules in Rule 81(a)(2).

In short, Respondent's interpretation of Rule 81(a)(2) is contrary to its language, its legislative history, and to the manner in which it has been construed by the federal courts.

2. *Court of Appeals' Interpretation.* The Court of Appeals construed Rule 81(a)(2) to bar the use of any procedure in the Rules which could not be demonstrated, by other than "theoretical" means, to have been (1) used in habeas corpus prior to enactment of the Rules in 1938 and (2) used in such pre-1938 habeas corpus in the same fashion that it was then used in actions at law and suits in equity. Thus, with reference to the Rule 33 discovery procedure ordered below, the Court of Appeals stated:

"Walker argues . . . that habeas proceedings are civil in nature and contends that since, prior to September 16, 1938, discovery practice was available in civil proceedings in general, it must be assumed that discovery was available in habeas proceedings. We do not believe that the second condition of Rule 81(a)(2) can be satisfied on such a theoretical basis. In our view, that condition is met only if it can be shown [1] that, prior to September 16, 1938, discovery was actually being used in habeas proceedings, and [2] that such use conformed to the then discovery practice in actions at law or suits in equity." *Wilson v. Harris*, 378 F.2d 141, 143-44 (9th Cir. 1967). (Bracketed numbers added).

The only authority mentioned by the Court in support of this interpretation of Rule 81(a)(2) was the naked language of that Rule's "second condition" restricting use of the Federal Rules "to the extent that the practice in [habeas corpus] proceedings . . . has heretofore conformed to the practice in actions at law or suits in equity." Like Respondent's interpretation, however, the Court's interpretation does violence to the language of Rule 81(a)(2) and causes it to operate in a manner which does not make

sense today and which could scarcely have been intended by its framers.

The "second condition" requires a comparison between past habeas corpus "practice" and ordinary civil "practice"—the term "practice" denoting the *general form* in which proceedings are conducted. Black, Law Dictionary, p. 1135 (4th ed. 1951). The Rules are, therefore, applicable to habeas today only "to the extent" that the *general form* of habeas corpus proceedings conformed to the *general form* of ordinary civil proceedings prior to September 16, 1938. Nothing in the language of the condition, however, requires a comparison between *specific procedures*—e.g., discovery procedures—employed in past habeas corpus practice and specific procedures employed in other kinds of civil proceedings. By requiring Petitioner Walker to show that the particular procedure which he sought to employ was "prior to September 16, 1938 . . . actually being used in habeas proceedings" and that "such use conformed to the then discovery practice in action at law or suits in equity," the Court imported into Rule 81(a)(2) a brand new prerequisite to the application of the Rules.

While this additional prerequisite would not strip modern habeas corpus practice of some of its traditional procedures as Respondent's interpretation would, it would still confine modern habeas corpus to those procedures alone. A procedural advance included in the Rules could not by definition conform to any procedure used in habeas corpus prior to enactment of the Rules. The effect of this reading of Rule 81(a)(2) would thus be to exclude such an advance automatically from use in habeas corpus proceedings. There is absolutely no evidence that the framers of Rule 81(a)(2) intended in this manner to freeze habeas proceedings in their pre-1938 form.

Moreover, such a reading of Rule 81(a)(2) is directly in conflict with several cases which have previously arisen in the Ninth Circuit. The specific procedures of discovery depositions and compulsory examinations, provided in Rules 30 and 35, were not used in either habeas corpus proceedings (or, for that matter, ordinary civil proceedings) prior to enactment of the Rules. Yet, as noted above, both of these novel devices have been employed in habeas corpus in recent years. See *Knowles v. Gladden*, 254 F. Supp. 643, 644-45 (D.Ore. 1965), *aff'd*, 378 F.2d 761 (9th Cir. 1967) (discovery deposition under Rules 26 and 30); *Smith v. United States*, 174 F.Supp. 828, 830 (S.D. Cal. 1959), *appeal dismissed*, 272 F.2d 228 (9th Cir. 1959), *cert. denied*, 362 U.S. 954 (1960) (mental examination under Rule 35).

Furthermore, even assuming that Rule 81(a)(2) does require Petitioner Walker to show that the specific procedure (discovery interrogatories) which he wished to employ was used in habeas corpus proceedings prior to enactment of the Rules, such a showing was adequately made. Unlike discovery depositions and medical examinations, discovery interrogatories were not a novelty when the Rules were enacted in 1938. Equity Rule 58, adopted in 1912, specifically provided that where, as here, a Court order was procured, such interrogatories could be employed. It stated in relevant part:

"The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories



in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit." [226 U.S. 665 (1912)].

While this procedure could technically be employed only in a suit in equity, such a suit could be initiated solely for the purpose of obtaining such discovery in aid of an action at law; therefore, the device was available for discovery purposes in civil actions generally, whether legal or equitable in nature. Moore and Garfinkel, 4 *Moore's Federal Practice*, §33.03[1], pp. 2261-62 (2d ed. 1967). Since, as even Respondent concedes, "habeas corpus has always been considered in the nature of a civil proceeding" (Response p. 18), there is every reason to believe that this discovery device was used in habeas corpus prior to enactment of the Rules, where, as here, a court order had been obtained.

The holding of the Court of Appeals below that this indication of usage was too "theoretical," however, says in effect that only the demonstration of reported instances of

conforming usage can satisfy the "second condition." This proof requirement, like the requirement of conformity to specific procedures used prior to 1938, has no basis in the language of Rule 81(a)(2). There is nothing in that language establishing any particular standard or method for making the requisite showing of conformity. There is certainly no language to suggest that the showing could be made only by production of reported instances of usage.

The absence of such language is hardly surprising. The silence of pre-1938 reported decisions—which are generally appellate decisions—with respect to the use of a particular procedure is as indicative that the procedure is being used without controversy as it is that the procedure is not being used at all. It is unlikely that the framers of Rule 81(a)(2) would have intended such ambiguous silence to preclude use of a Rule. And it is improbable that the framers would have intended that the availability of a Rule should depend upon the happenstance that its counterpart in habeas corpus prior to September 16, 1938 would be reported.

In sum, the requirements of procedural conformity and of reported proof of that conformity which were found by the Court of Appeals below to bar Petitioner Walker's use of discovery interrogatories are simply requirements of the Court's own making. They enjoy no support in the language of Rule 81(a)(2) and, if read into it, will cause it to operate in an arbitrary and regressive manner.

*3a Petitioner's Interpretation.* Petitioner interprets the "second condition" of Rule 81(a)(2) to bar the use of only those Rules providing techniques which could not be used in the general form or practice of habeas corpus as such

practice existed prior to enactment of the Rules. Rules 47 through 51, governing the conduct of jury trials, are examples of Rules made inapplicable by this provision. When the Rules were enacted in 1938, habeas corpus practice differed from ordinary civil practice in that jury trials were not held. William S. Church, *A Treatise on the Writ of Habeas Corpus*, §172 (2d ed. 1893). The Rules governing jury trials had no application to habeas corpus practice at that time. Thus, they are excluded by Rule 81(a)(2).

The discovery rules, however, are a different matter. Although jury trials were not a part of habeas corpus practice in 1938, trials of fact, particularly on jurisdictional issues, were an established part of habeas corpus as well as ordinary civil practice. William S. Church, *A Treatise on the Writ of Habeas Corpus*, §§170-71 (2d ed. 1893); Paul M. Bator, "Finality In Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441, 465-483 (1963). Discovery devices, designed as they are to facilitate trials of fact, were as suitable for use in a 1938 habeas corpus proceeding as they were in other civil proceedings. Thus, Rule 81(a)(2) does not preclude their use.

This interpretation accords with the language of the "second condition" of the Rule. As noted above, the comparison called for by the language of that provision is not between specific procedures, but between the "practice"—or general format of proceeding—in habeas corpus and that in ordinary civil proceedings in 1938. The Rules are thus excluded only "to the extent that" the general form of proceeding in habeas corpus did not conform to that in ordinary civil proceedings. To that degree, the Rules of procedure governing ordinary civil proceedings would

naturally be anomalous or unsuitable in the context of habeas corpus. However, to the extent that the format of habeas proceedings did conform to that in ordinary civil proceedings, the language of the "second condition" does not purport to exclude the use of the Rules of procedure governing ordinary civil proceedings. To this degree, the Rules would be as suitable for habeas corpus as for ordinary civil proceedings.

There is, moreover, no reason to believe that the framers of this provision intended it to preclude the use of any except Rules unsuitable to habeas corpus proceedings. What little legislative history exists bespeaks an intent to exclude the use of some Rules, but there is nothing in it to indicate that the framers wished to prevent the use of such Rules as were useful and appropriate in the traditional habeas format. It seems far more likely that the framers simply did not wish the enactment of the Rules to change that basic format and drafted this provision to insure that only such Rules as were suitable to, and consistent with, that format would be applied.

This has been the interpretation placed upon the provision by the federal courts in the many cases cited above in which various Rules have been applied in habeas corpus. The concern in those cases has not been whether or not the procedures in those Rules were used in habeas corpus prior to 1938; it has instead been whether or not those Rules were suitable in the context of traditional habeas corpus.

This is, we submit, the only inquiry which is compelled by the "second condition" of Rule 81(a)(2). So judged, the discovery interrogatory procedure which petitioner Walker sought to employ in this case is surely available.

**CONCLUSION**

For the reasons stated, petitioner prays that the decision of the Court of Appeals be reversed, that its writ of mandamus and/or prohibition be quashed, and that the order of the District Court denying the objections of Respondent to petitioner Walker's interrogatories and compelling answers thereto be reinstated.

Respectfully submitted,

J. STANLEY POTTINGER,

J. THOMAS ROSCH,

*Attorneys for Petitioner.*



# INDEX

	Page
Question presented.....	1
Interest of the United States.....	1
Statement.....	2
Argument.....	4
Introduction and Summary.....	4
The discovery provisions of the Rules of Civil Pro- cedure do not apply as a matter of course in habeas corpus or Section 2255 proceedings.....	6
Conclusion.....	15

## CITATIONS

### Cases:

<i>Albert v. Patterson</i> , 155 F. 2d 429.....	8
<i>Anderson v. United States</i> , 367 F. 2d 553, certiorari denied, 386 U.S. 1025.....	9
<i>Brown v. Allen</i> , 344 U.S. 443.....	9, 12
<i>Burleson v. United States</i> , 205 F. Supp. 331.....	2, 8
<i>Corsetti, United States ex rel. v. Commanding Officer of Camp Upton</i> , 3 F.R.D. 360.....	8
<i>Davis v. United States</i> , 311 F. 2d 495, certiorari denied, 374 U.S. 846.....	9
<i>Fay v. Noia</i> , 372 U.S. 391.....	10
<i>Goldsby, United States ex rel. v. Harpole</i> , 249 F. 2d 417.....	8
<i>Hardison v. Dunbar</i> , 256 F. Supp. 412.....	8
<i>Hill v. United States</i> , 368 U.S. 424.....	2
<i>Holiday v. Johnston</i> , 313 U.S. 342.....	8, 9
<i>Hunter v. Thomas</i> , 173 F. 2d 810.....	8
<i>Jelic, United States ex rel. v. District Director</i> , 106 F. 2d 14.....	8
<i>Miner v. Atlass</i> , 363 U.S. 641.....	8, 10, 13
<i>Royal, Ex parte</i> , 117 U.S. 241.....	9
<i>Ruby v. United States</i> , 341 F. 2d 585, certiorari denied, 384 U.S. 979.....	9

## II

### Cases—Continued

	Page
<i>Sanders v. United States</i> , 373 U.S. 1.....	2, 9, 11
<i>Schiebelhut v. United States</i> , 318 F. 2d 785.....	2
<i>Storti v. Massachusetts</i> , 183 U.S. 138.....	9
<i>Sullivan v. United States</i> , 198 F. Supp. 624.....	2, 8
<i>Townsend v. Sain</i> , 372 U.S. 293.....	10
<i>United States v. Adams</i> , 3 F.R.D. 396.....	8
<i>United States v. Hayman</i> , 342 U.S. 205.....	2, 7, 10, 12
<i>United States v. Kelly</i> , 269 F. 2d 448, certiorari denied, 362 U.S. 904.....	6
<i>United States v. Lowe</i> , 367 F. 2d 44.....	9
<i>United States v. White</i> , 342 F. 2d 379, certiorari denied, 382 U.S. 871.....	6
<i>Wheeler v. United States</i> , 340 F. 2d 119.....	9
<i>Wilson v. Harris</i> , 378 F. 2d 141.....	4
<i>Wilson v. Weigel</i> , 387 F. 2d 632, petition for a writ of a certiorari pending <i>sub nom. Roberts v. Nelson</i> , No. 52 Misc. this Term.....	7, 8
 Statutes and rules:	
18 U.S.C. 3500.....	7
18 U.S.C. 3771.....	14
18 U.S.C. 3772.....	14
28 U.S.C. 2072 (Supp. III, 1965-1967).....	14
28 U.S.C. 2073.....	14
28 U.S.C. 2242.....	9
28 U.S.C. 2243.....	4, 8, 9
28 U.S.C. 2246.....	3
28 U.S.C. 2244.....	9
28 U.S.C. 2254 (Supp. III, 1965-1967).....	9
28 U.S.C. 2255.....	<i>in passim</i>
California State Health and Safety Code, Section 11530.5.....	2
 Federal Rules of Civil Procedure:	
Rule 1.....	7
Rule 4(f).....	8
Rule 8.....	8
Rule 16.....	7, 10
Rule 26.....	3
Rule 26(b).....	3, 8
Rule 33.....	3
Rule 52.....	8
Rule 59.....	8
Rule 81(a)(2).....	7, 8

Federal Rules of Criminal Procedure:

Rule 16.....

Page  
7

Miscellaneous:

Annual Report of the Director of the Administrative  
Office of the United States Courts (1967).....

12

*Applications for Writs of Habeas Corpus and Post Con-  
viction Review of Sentences in the United States  
Courts*, 33 F.R.D. 363.....

12

Brennan, *The Criminal Prosecution: Sporting Event  
or Quest for Truth*, 1963 Wash. U.L.Q. 279.....

6

Carter, *Pre-Trial Suggestions for Section 2255 Cases*,  
32 F.R.D. 391.....

2

Everett, *Discovery in Criminal Cases—In Search of a  
Standard*, 1964 Duke L.J. 477.....

6

Judicial Conference of the Second Judicial Circuit,  
*Discovery in Criminal Cases*, 44 F.R.D. 481.....

7

Louisell, *Criminal Discovery: Dilemma Real or Ap-  
parent?* 49 Calif. L. Rev. 56.....

6

Louisell, *The Theory of Criminal Discovery and the  
Practice of Criminal Law, Appendix: Criminal Dis-  
covery in the States*, 14 Vand. L. Rev. 921.....

6

2 Moore's Federal Practice §26.01.....

9

Note, *Civil Discovery in Habeas Corpus*, 67 Colum. L.  
Rev. 1296.....

7

Panel on Pre-Trial Discovery in Criminal Cases, 31  
Brooklyn L. Rev. 320.....

6

The President's Commission on Law Enforcement and  
Administration of Justice, *Task Force Report: The  
Courts*, pp. 45-47.....

12, 13

Traynor, *Ground Lost and Found in Criminal Dis-  
covery*, 39 N.Y.U.L. Rev. 228.....

6

# In the Supreme Court of the United States

OCTOBER TERM, 1968

---

No. 199

GEORGE B. HARRIS, JUDGE OF THE UNITED STATES  
DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA, PETITIONER

v.

LOUIS NELSON, WARDEN

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

## QUESTION PRESENTED

Whether the discovery provisions of the Federal Rules of Civil Procedure are applicable to federal habeas corpus proceedings.

## INTEREST OF THE UNITED STATES

The grant of certiorari in this case (392 U.S. 925) raises a question of major importance to the effective administration of criminal justice—i.e., whether the discovery provisions of the Federal Rules of Civil Procedure apply as a matter of course in all cases in which a convicted criminal seeks to overturn his con-

viction in a collateral proceeding in a federal district court. The federal interest in the outcome of this litigation is substantial since it is apparent that, if the federal discovery rules are deemed applicable when the challenge is by habeas corpus, they would also apply in proceedings under 28 U.S.C. 2255—the federal statutory counterpart to habeas corpus “affording the same rights in another and more convenient forum.” *United States v. Hayman*, 342 U.S. 205, 219; see also *Sanders v. United States*, 373 U.S. 1, 13–15; *Hill v. United States*, 368 U.S. 424, 427–428; *Schiebelhut v. United States*, 318 F. 2d 785 (C.A. 6); *Burleson v. United States*, 205 F. Supp. 331, 334 (W.D. Mo.); *Sullivan v. United States*, 198 F. Supp. 624 (S.D.N.Y.); Carter, *Pre-Trial Suggestions for Section 2255 Cases*, 32 F.R.D. 391, 396.

#### STATEMENT

On December 5, 1963, Alfred Walker was convicted in a California state court of possession of marijuana, in violation of Section 11530.5 of the California Health and Safety Code. After exhausting state appellate remedies, on November 22, 1965, he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, alleging, as he had in the state courts, that the informant who provided the information leading to his arrest was not shown to have been reliable and that the evidence seized in the search incident to that arrest was therefore illegally obtained and improperly admitted into evidence at his trial. The state filed a return to the order to show cause on December 20,



1965. Counsel was appointed for Walker on March 16, 1966.

On August 15, 1966, a motion for an evidentiary hearing was granted by the district court. On October 20, 1966, counsel for petitioner served the respondent warden, pursuant to Rules 26(b) and 33 of the Federal Rules of Civil Procedure, with a series of interrogatories seeking discovery of certain facts relative to the prior reliability of the informant—i.e., prior arrests and convictions based in whole or in part upon information obtained from this informant by the arresting officer in this case, as well as whether the arresting officer had previously obtained any information from the informant he “[d]id not consider reliable” or “[d]id not consider sufficient \* \* \* to make an arrest or search without a warrant” (R. 34–35). Respondent objected to the interrogatories on the ground that the Rules of Civil Procedure do not apply to habeas corpus proceedings and that the statutory provision for interrogatories in habeas corpus, 28 U.S.C. 2246, authorizes interrogatories only as a means of obtaining evidence and not for discovery (R. 36–38). Without stating its reasons, the district court denied the objections and directed that the interrogatories be answered (R. 39). Upon respondent’s petition for a writ of mandamus and/or prohibition, the Court of Appeals for the Ninth Circuit, on May 10, 1967, vacated the order of the district court authorizing the interrogatories. The court of appeals held that the discovery provisions of the Federal Rules of Civil Procedure were not applicable to habeas corpus proceedings and that 28 U.S.C. 2246 did not

authorize the use of interrogatories for discovery. *Wilson v. Harris*, 378 F. 2d 141; R. 40.

#### ARGUMENT

##### INTRODUCTION AND SUMMARY

As noted above, the interest of the United States arises primarily from the impact that the decision in this case will have on actions brought by federal prisoners under 28 U.S.C. 2255. We submit that the framers of the Civil Rules did not intend that they should apply in collateral proceedings and that their application would unduly obstruct the prompt disposition of such cases which the statutes contemplate.

In saying this, we do not wish to be understood to be arguing that the district court may never order discovery in a habeas corpus or Section 2255 proceeding. Indeed, we do not doubt that the statutory command that the court should "dispose of the matter as law and justice require" (28 U.S.C. 2243) would justify the court, in exceptional circumstances, in ordering discovery in such a proceeding. As we read the record, however, that question is not presented here. Counsel for the habeas corpus applicant here never purported to be invoking any inherent power of the court to order discovery (R. 34-35). Indeed, he relied solely on the civil rules provisions and served the interrogatories on respondent without any special order of the court. Insofar as the record reveals, the district court did not indicate that it was exercising an inherent power to order discovery under the circumstances (R. 39) and the court of appeals neither discussed nor suggested that inherent power under special cir-

cumstances was involved (R. 40-44).<sup>1</sup> Thus, it appears that the only question presented is whether the discovery provisions of the Rules of Civil Procedure apply as a matter of course in all habeas corpus proceedings.

In view of the close relationship between the original criminal trial and the habeas corpus proceeding there is no logical reason why there should be a greater degree of discovery in the collateral proceeding than existed prior to trial. The question arises only because proceedings in habeas corpus and under Section 2255 are technically "civil" in character; from this it is argued that they are governed by the Federal Rules of Civil Procedure—which provide a far broader right of discovery than is available in criminal prosecutions. But the fact is that the language of the Civil Rules clearly expresses the intention of the rule-makers that they should not apply in collateral proceedings. Moreover, the traditional purpose of habeas corpus—to provide swift determination of the legality of a prisoner's custody—would be frustrated if civil discovery procedures, with their attendant delays, were available as a matter of course in such proceedings. If some type of discovery is appropriate in such cases, any change in procedure should be accomplished by promulgating particular-

---

<sup>1</sup> The discovery sought by way of interrogatories does not appear to have been necessary to a fair hearing in the instant case. The applicant sought information from respondent warden concerning prior use of the informant by the arresting officer; but the arresting officer was known and had testified at preliminary hearing and trial on precisely the issue of the reliability of the informant. There is no reason to believe that the information sought could not have been obtained by questioning at the habeas corpus hearing.

ized rules which take into account the special dangers of abuse in this context, rather than by a simple extension of all of the discovery provisions of the Civil Rules to habeas corpus proceedings.

THE DISCOVERY PROVISIONS OF THE RULES OF CIVIL PROCEDURE DO NOT APPLY AS A MATTER OF COURSE IN HABEAS CORPUS OR SECTION 2255 PROCEEDINGS

1. Habeas corpus to review a state criminal conviction, and its federal statutory counterpart, 28 U.S.C. 2255, though labeled civil proceedings, cannot realistically be separated from the criminal source of the remedies sought. Compare *United States v. White*, 342 F. 2d 379, 382 (C.A. 4), certiorari denied, 382 U.S. 871, and *United States v. Kelly*, 269 F. 2d 448, 451-452 (C.A. 10), certiorari denied, 362 U.S. 904. The close interrelationship between the original criminal case and collateral attack on the criminal judgment suggests that the procedures in the collateral proceeding should not vary substantially from those provided in the criminal prosecution. The limits of discovery available in a federal criminal trial are precisely defined in the Federal Rules of Criminal Procedure<sup>2</sup>

<sup>2</sup> The states vary widely in the availability of criminal discovery; however, few states have criminal discovery as broad as granted in the Federal Rules of Criminal Procedure, which have not been free of controversy. See Generally, *Panel on Pre-Trial Discovery in Criminal Cases*, 31 Brooklyn L. Rev. 320 (1965); Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 Duke L.J. 477; Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 Wash. U.L.Q. 279; Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 Calif. L. Rev. 56 (1961); Louisell, *The Theory of Criminal Discovery and the*



and are much narrower than the broad discovery permitted under the Civil Rules. See Rule 16, F.R. Cr. P.; cf. 18 U.S.C. 3500; Note, *Civil Discovery in Habeas Corpus*, 67 Colum. L. Rev. 1296, 1307-1309.

There is no reason to assume that the framers of the civil rules intended to give convicted criminals a greater right of discovery after trial than before. See *Wilson v. Weigel*, 387 F. 2d 632, 634 (C.A. 9); petition for certiorari pending *sub nom. Roberts v. Nelson*, No. 52 Misc., this Term. Indeed, the Civil Rules themselves clearly manifest that they were not intended to apply to habeas corpus proceedings.<sup>3</sup>

Rule 1 of the Federal Civil Rules recognized that certain "suits of a civil nature" were not to be governed by those rules. Rule 81(a)(2) expressly provided that habeas corpus was one of those "suits of a civil nature" to which the new rules were not to apply, except to the extent that the practice in habeas corpus proceedings had "heretofore conformed to the practice in actions at law or suits in equity" and was not governed by statute.<sup>4</sup> The language is not ambiguous.

*Practice of Criminal Law, Appendix: Criminal Discovery in the States*, 14 Vand. L. Rev. 921, 938-945 (1961); Judicial Conference of the Second Judicial Circuit, *Discovery in Criminal Cases*, 44 F.R.D. 481 (1968).

<sup>3</sup> Since § 2255 was intended to serve the same purpose as habeas corpus (*United States v. Hayman*, 342 U.S. 205) there is no reason to differentiate between habeas corpus and Section 2255 proceedings with regard to the applicability of discovery rules.

<sup>4</sup> It should be noted that Rule 81(a)(2) was amended effective July 1, 1968, to eliminate as inappropriate any reference to appellate procedure in the civil rules following the effective date of the Federal Appellate Rules. It is agreed, however, that the amendment made no substantive change in the appropriate application of the civil rules to habeas corpus proceedings (Pet. Br. 24-25; N.A.A.C.P. *Amicus* Br. 8 note 6).



While a number of courts have applied various provisions of the Civil Rules in habeas corpus and Section 2255 proceedings without meaningful discussion, the sounder decisions have recognized the limitations of Rule 81 and carefully considered whether there was a statute bearing on the matter and, if not, whether the civil rule in question conformed to the previous practice in habeas corpus.<sup>5</sup>

2. Petitioner's contention that the Civil Rules should be applied in habeas corpus proceedings is not

---

<sup>5</sup> See *Holiday v. Johnston*, 313 U.S. 342 (Rule 53 conflicts with 28 U.S.C. 2243); *Wilson v. Weigel*, 387 F. 2d 632 (C.A. 9), petition for a writ of certiorari pending *sub nom. Roberts v. Nelson*, No. 52 Misc., this Term (Rules 26 and 33 discovery provisions not applicable); *Hunter v. Thomas*, 173 F. 2d 810, 812 (C.A. 10) (Rule 59 applicable); *Albert v. Patterson*, 155 F. 2d 429, 432-433 (C.A. 1) (Rule 52(a) findings of fact and conclusions of law not applicable); *Burleson v. United States*, 205 F. Supp. 331, 334 (W.D. Mo.) (Rule 8 notice pleadings not applicable); *Sullivan v. United States*, 198 F. Supp. 624 (S.D.N.Y.) (Rule 33 discovery provisions not applicable); *United States ex rel. Corsetti v. Commanding Officer of Camp Upton*, 3 F.R.D. 360, 362 (E.D.N.Y.) (Rule 4(f) not applicable to determine territorial jurisdiction of habeas corpus); *United States v. Adams*, 3 F.R.D. 396, 404 (S.D.N.Y.) (Rule 52 findings of fact not applicable); cf. *United States ex rel. Goldsby v. Harpole*, 249 F. 2d 417, 420 note 3 (C.A. 5); *United States ex rel. Jelic v. District Director*, 106 F. 2d 14 (C.A. 2); *Hardison v. Dunbar*, 256 F. Supp. 412 (N.D. Cal.).

Petitioner and N.A.A.C.P. *Amicus* both urge that the term "practice" as used in Rule 81(a)(2) should be construed as referring to the "general format of proceeding" rather than any "specific procedure" (Pet. Br. 34-35; *Amicus* Br. 24-27). Even assuming as much, a move to pre-trial discovery in habeas corpus to provide the factual basis for issuance of the writ, is a substantial departure in format. Moreover, this Court clearly considered the taking of depositions for discovery a "practice" in *Miner v. Atlass*, 363 U.S. 641, 647.

only contrary to the plain language of the rules themselves but is also significantly at odds with the traditional nature and purpose of habeas corpus and its statutory counterpart, 28 U.S.C. 2255. It is well settled that in a habeas corpus or Section 2255 proceeding the petitioner may not state only bald legal conclusions but must meet the statutory test of alleging facts which, if accepted at face value, would entitle him to relief.<sup>6</sup> See *Sanders v. United States*, 373 U.S. 1, 13-15; *Brown v. Allen*, 344 U.S. 443, 461, 502, 547-548; *Anderson v. United States*, 367 F. 2d 553, 554 (C.A. 10), certiorari denied, 386 U.S. 1025; *United States v. Lowe*, 367 F. 2d 44, 45-46 (C.A. 7); *Wheeler v. United States*, 340 F. 2d 119, 121 (C.A. 8); *Davis v. United States*, 311 F. 2d 495, 496 (C.A. 7), certiorari denied, 374 U.S. 846; 28 U.S.C. 2242 (1964); 28 U.S.C. 2244, 2254 (Supp. III, 1965-1967). Moreover habeas corpus and Section 2255 proceedings are summary in nature and contemplate swift resolution of disputed issues of custody. See *Brown v. Allen*, 344 U.S. 443, 462; *Holiday v. Johnston*, 313 U.S. 342; *Storti v. Massachusetts*, 183 U.S. 138, 143; *Ex parte Royall*, 117 U.S. 241, 250-253; 28 U.S.C. 2242-2243, 2255. Both the habeas corpus statutes (see 28 U.S.C. 2243) and 28 U.S.C. 2255 expressly provide for prompt consideration of the claim for relief. See *Ruby v. United States*, 341 F. 2d 585 (C.A. 9), certiorari denied, 384 U.S. 979.

---

<sup>6</sup> By way of contrast, "[i]n most cases under the Federal [Civil] Rules the function of the pleadings extends hardly beyond notification to the opposing parties of the general nature of a party's claim or defense." 2 Moore's Federal Practice § 26.01, p. 2442 (1938).

These fundamental attributes of habeas corpus and Section 2255 proceedings—factual allegations in the petition which on their face justify relief and dispatch in determining whether the prisoner is being held contrary to law—would tend to be defeated if the discovery procedures of the Civil Rules with their attendant delays were to be made available, as a matter of course, in such proceedings.

The delay that can result from the handling of a habeas corpus petition as a normal civil matter is illustrated by this case. The application was filed on November 22, 1965. A return to the order to show cause was made in December 1965, after which the court informed respondent that an evidentiary hearing *may* be required. The court then appointed an attorney to represent the applicant, apparently to investigate and compile the facts. Counsel set out to interview the informant. After getting an affidavit in which she recounted her participation in the investigation and admitted one other informing incident but denied several others, counsel on August 5, 1966, filed a motion for an evidentiary hearing and a pre-trial conference under Rule 16 of the civil rules. Both were approved on August 15, 1966 and a pre-trial conference set for September 1, 1966.<sup>1</sup> The discovery interrogatories were served on respondent on October 20, 1966, without leave of the court. On October 21, 1966, the court ordered respondent to answer them. Thus, almost one year after the application for habeas

---

<sup>1</sup> There is nothing in the record to indicate whether the pre-trial conference was held.

corpus was filed, it progressed to the "discovery" stage. Can it be doubted that both the habeas applicant's and the state's interest would have been better served if a prompt hearing had been held as contemplated and required by Congress?

To uphold the ruling of the court of appeals would not imply any view by this Court as to the desirability of having some discovery procedure in habeas corpus and Section 2255 proceedings. This Court has never been insensitive to the legitimate needs of the habeas corpus applicant (see, e.g., *Sanders v. United States*, 373 U.S. 1; *Townsend v. Sain*, 372 U.S. 293; *Fay v. Noia*, 372 U.S. 391); nor has Congress, after due deliberation, been reluctant to make improved substance and procedure available to those in custody of law (see *United States v. Hayman*, 342 U.S. 205, 210-219). As the Court pointed out in *Miner v. Atlass*, *supra*, 363 U.S. at 651:

Those who advise the Court with respect to the exercise of its rule-making powers—more particularly of course the Judicial Conference of the United States (28 U.S.C. § 331) \* \* \* — are left wholly free to approach the question of amendment \* \* \* of the rules in the light of whatever considerations seem relevant to them, including of course the experience gained by the District Courts \* \* \*.

The potential for harassment and overburdening of the courts that would exist if civil discovery procedures were to be available as a matter of course in habeas corpus and Section 2255 proceedings makes this an area where it is particularly appropriate that any

change in procedure should come about only through the operation of the rule-making process. The federal district court dockets are flooded annually with an ever increasing load of state prisoner petitions. In addition, there has been a substantial increase in petitions by federal prisoners under Section 2255. The Annual Report of the Director of the Administrative Office of the United States Courts, pp. 135-137 (1967), shows that state habeas corpus petitions have increased from 1,903 in 1963 to almost 6,000 in 1967 while federal motions to vacate sentence have almost doubled in the same period—from 450 in 1963 to 818 in 1967 with a peak load of 1,122 in 1965. One out of every seven civil actions commenced in the United States District Courts during 1967 was one in which a prisoner was petitioner. Experience has shown that many of these collateral review petitions are drafted by the prisoners without benefit of legal counsel, are often repeater petitions continuing for years after the original conviction, and that a substantial majority are almost wholly without merit. See *Brown v. Allen*, 344 U.S. 443, 536-540 (Mr. Justice Jackson concurring in result); *United States v. Hayman*, 342 U.S. 205, 212-213; The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts*, pp. 45-47 (1967); *Applications for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts*, 33 F.R.D. 363, 384-385, 409-411, 413-416, 453, 484, 488-489. The burdens imposed have become a matter of continuing and increasing concern to both prosecutors and judges.



*Task Force Report: The Courts, supra*, at pp. 45-47.

If each petitioner were entitled to the full use of civil discovery procedures, the opportunities for abuse of the writ would be greatly increased. For example, every prisoner, simply by filing a petition alleging that the government knowingly used perjured evidence against him, would become entitled to depose the prosecutor, all witnesses and all law enforcement officials associated with the investigation. Similarly, by merely alleging the suppression of exculpatory evidence, every criminal defendant could obtain discovery of virtually all the information in the prosecution's files. Not only would such motions place a tremendous burden on the already overburdened staff in most prosecutors' offices, it would also place great burdens on the courts which would, no doubt, be called upon in almost every case to rule upon questions of privilege and materiality.

These considerations make particularly appropriate here this Court's reasoning in *Miner v. Atlass*, 363 U.S. 641, 649-650.

Discovery by deposition is at once more weighty and more complex a matter than either of the examples just discussed or others that might come to mind. Its introduction into federal procedure was one of the major achievements of the Civil Rules, and has been described by this Court as "one of the most significant innovations" of the rules. \* \* \* Moreover, the choice of procedures adopted to govern various specific problems arising under the system was in some instances hardly less

significant than the initial decision to have such a system. It should be obvious that we are not here dealing either with a bare choice between an affirmative or a negative answer to a narrow question, or even less with the necessary choice of a rule to deal with a problem which must have an answer, but need not have any particular one. Rather, the matter is one which, though concededly "procedural," may be of as great importance to litigants as many a "substantive" doctrine \* \* \*.

The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, see 28 U.S.C. § 331 (advisory function of Judicial Conference), 28 U.S.C. § 2073 (prior report of proposed rule to Congress), *designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords.* \* \* \* [Emphasis added.]<sup>8</sup>

<sup>8</sup> 28 U.S.C. 2073 has been repealed and combined with 28 U.S.C. 2072 (Supp. III, 1965-1967) providing that "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases \* \* \*."

Similar rule making power exists for criminal actions. See 18 U.S.C. 3771 and 3772.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

FRED M. VINSON, Jr.,  
*Assistant Attorney General.*

JOHN S. MARTIN, Jr.,  
*Assistant to the Solicitor General.*

JEROME M. FEIT,  
PAUL C. SUMMITT,  
*Attorneys.*

OCTOBER 1968.

LIBRARY  
SUPREME COURT

# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, Judge of the United States  
District Court for the Northern District of California,  
*Petitioner,*

vs.

LOUIS NELSON, Warden, California  
State Prison at San Quentin,  
*Respondent.*

## BRIEF FOR RESPONDENT,

Joined In and Adopted by the States of Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, and Wisconsin, The Territory of Guam, and The National District Attorneys' Association, Appearing as Amici Curiae.

THOMAS C. LYNCH,

Attorney General of the State of California,

ALBERT W. HARRIS, JR.,

Assistant Attorney General of the State of California,

DERALD E. GRANBERG,

Deputy Attorney General of the State of California,

CHARLES R. B. KIRK,

Deputy Attorney General of the State of California,

6000 State Building,

San Francisco, California 94102,

Telephone: 557-0357,

*Attorneys for Respondent.*

(The names of attorneys appearing for amici curiae are listed inside.)

Office-Supreme Court, U.S.

FILED

OCT 26 1968

JOHN F. DAVIS, CLERK

**MACDONALD GALLION,**

Attorney General of the State of Alabama,  
Montgomery, Alabama 36104.

**GARY K. NELSON,**

Attorney General of the State of Arizona,  
State Capitol, Phoenix, Arizona 85007.

**JOE PURCELL,**

Attorney General of the State of Arkansas,  
Justice Building, Little Rock, Arkansas.

**DUKE W. DUNBAR,**

Attorney General of the State of Colorado,  
Denver, Colorado 80203.

**DAVID P. BUCKSON,**

Attorney General of the State of Delaware,  
1206 King Street, Wilmington, Delaware 19801.

**EARL FAIRCLOTH,**

Attorney General of the State of Florida,  
State Capitol, Tallahassee, Florida 32304.

**ARTHUR K. BOLTON,**

Attorney General of the State of Georgia,  
135 State Judicial Building, Atlanta, Georgia 30334.

**BERT T. KOBAYASHI,**

Attorney General of the State of Hawaii,  
Iolani Palace Grounds, Honolulu, Hawaii 96813.

**WILLIAM G. CLARK,**

Attorney General of the State of Illinois,  
Supreme Court Building, Springfield, Illinois 62706 (b).

**JOHN J. DILLON,**

Attorney General of the State of Indiana,  
219 State House, Indianapolis, Indiana 46204.

**RICHARD C. TURNER,**

Attorney General of the State of Iowa,  
State House, Des Moines, Iowa 50319.

**JOHN B. BRECKINRIDGE,**

Attorney General of the Commonwealth of Kentucky,  
Frankfort, Kentucky.

**JACK P. F. GREMILLION,**

Attorney General of the State of Louisiana,  
Baton Rouge, Louisiana 70804.

**JAMES S. ERWIN,**

Attorney General of the State of Maine,  
State House, Augusta, Maine 04330.

**FRANCIS B. BURCH,**

Attorney General of the State of Maryland,  
One Charles Center, Baltimore, Maryland 21201.

**ELLIOT L. RICHARDSON,**

Attorney General of the State of Massachusetts,  
State House, Boston, Massachusetts 02133.



**DOUGLAS M. HEAD,**

Attorney General of the State of Minnesota,  
State Capitol, St. Paul, Minnesota 55101.

**JOE T. PATTERSON,**

Attorney General of the State of Mississippi,  
State Capitol, Jackson, Mississippi 39201.

**CLARENCE A. H. MEYER,**

Attorney General of the State of Nebraska,  
Lincoln, Nebraska 68509.

**HARVEY DICKERSON,**

Attorney General of the State of Nevada,  
Carson City, Nevada 89701.

**ARTHUR J. SILLS,**

Attorney General of the State of New Jersey,  
Trenton, New Jersey 08625.

**BOSTON E. WITT,**

Attorney General of the State of New Mexico,  
Santa Fe, New Mexico 87501.

**LOUIS J. LEFKOWITZ,**

Attorney General of the State of New York,  
State Capitol, Albany, New York 12225(d).

**T. WADE BRUTON,**

Attorney General of the State of North Carolina,  
Raleigh, North Carolina 27602.

**HELGI JOHANNESON,**

Attorney General of the State of North Dakota,  
Bismarck, North Dakota 58501.

**WILLIAM B. SAXBE,**

Attorney General of the State of Ohio,  
Columbus, Ohio 43215.

**G. T. BLANKENSHIP,**

Attorney General of the State of Oklahoma,  
Oklahoma City, Oklahoma 73105.

**WILLIAM C. SENNETT,**

Attorney General of the State of Pennsylvania,  
Harrisburg, Pennsylvania 17120.

**HERBERT F. DESIMONE,**

Attorney General of the State of Rhode Island,  
Providence, Rhode Island 02903.

**DANIEL R. MCLEOD,**

Attorney General of the State of South Carolina,  
Columbia, South Carolina 29201.

**GEORGE F. MCCANLESS,**

Attorney General of the State of Tennessee,  
Nashville, Tennessee 37219.

**JAMES L. OAKES,**

Attorney General of the State of Vermont,  
Montpelier, Vermont 05602.

**ROBERT Y. BUTTON,**

Attorney General of the Commonwealth of Virginia,

**RENO S. HARP, III,**

Assistant Attorney General of the Commonwealth of Virginia,  
Richmond, Virginia 23219.

**JOHN J. O'CONNELL,**

Attorney General of the State of Washington,  
Temple of Justice, Olympia, Washington 98501.

**BRONSON C. LAFOLLETTE,**

Attorney General of the State of Wisconsin,  
State Capitol, Madison, Wisconsin 53702.

**PAUL J. ABBATE,**

Attorney General of the Territory of Guam,  
Agana, Guam 96910.

**PATRICK F. HEALEY,**

Executive Director,  
National District Attorneys' Association,  
211 East Chicago Avenue, Chicago, Illinois 60611.

## Topical Index

	Page
Opinion Below .....	2
Jurisdiction .....	2
Statutes and Rules Involved .....	2
Questions Presented .....	2
Statement of the Case .....	3
Summary of Argument .....	10
Argument:	
I. Petitioner cannot now raise questions which were neither presented to the Court of Appeals nor contained in the petition for certiorari .....	14
II. Authorization for discovery interrogatories in habeas corpus cannot be found in the "hearing" requirement of Section 2243 .....	18
A. The Habeas Corpus Act authorizes the use of depositions and interrogatories only for evidentiary purposes .....	19
B. Discovery is a significant innovation which should not be extended to habeas corpus without special congressional authorization .....	22
C. No warrant for discovery in habeas proceedings can be found in decisions of this Court .....	24
D. Discovery would not enhance the reliability of the fact-finding process and would defeat the summary-hearing provisions of the Habeas Act .....	25
E. Whether discovery should be extended to habeas proceedings should be left to Congress .....	30
III. The District Court did not have "inherent power" to authorize discovery interrogatories in a habeas corpus proceeding .....	31
IV. The "all writs" statute does not provide a district court with a basis for authorizing discovery interrogatories in a habeas corpus proceeding .....	39

	Page
V. The discovery provisions of the Federal Rules of Civil Procedure do not apply to habeas corpus proceedings	48
A. Analysis of the legislative history of the Rule 81(a)(2) exclusion compels the conclusion that the framers intended the Rules to have an exceedingly limited applicability to habeas corpus	52
B. Discovery under the Civil Rules does not apply to habeas corpus since neither criterion of Rule 81(a)(2) can be satisfied	59
Conclusion	74
Appendix	

## Table of Cases Cited

	Pages
Abel v. Tinsley, 338 F.2d 514 (10th Cir. 1964) .....	50, 72
Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) .....	44, 46
Albert ex rel. Buice v. Patterson, 155 F.2d 429 (1st Cir.), cert. denied, 329 U.S. 739 (1946) .....	50
Allison v. Wilson, 277 F.Supp. 271 (N.D.Cal. 1967) .....	28
Ashcraft v. Tennessee, 322 U.S. 143 (1943) .....	15
Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955) .....	51
Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929) .....	41
Bethlehem Shipbuilding Corp. v. NLRB, 120 F.2d 126 (1st Cir. 1941) .....	43
Blackmer v. United States, 284 U.S. 421 (1932) .....	41
Blair v. United States, 250 U.S. 273 (1919) .....	41
Botany Worsted Mills v. United States, 278 U.S. 282 (1929) .....	46, 57, 59
Bowdidge v. Lehman, 252 F.2d 366 (6th Cir. 1958) ....	49, 70, 72
Bowen v. Boles, 258 F.Supp. 111 (N.D.W.Va. 1966) .....	49, 70
Bowman Dairy Co. v. United States, 341 U.S. 214 (1951) .....	41, 42, 47
Brown v. Allen, 344 U.S. 443 (1953) ....	18, 23, 24, 26, 27, 38, 46, 60
Brunswick v. Elliott, 103 F.2d 746 (D.C. Cir. 1939) .....	41
Burleson v. United States, 205 F.Supp. 331 (W.D.Mo. 1962) .....	50
Carey v. Settle, 351 F.2d 483 (8th Cir. 1965) .....	28
Cary v. Curtis, 44 U.S. (3 How.) 235 (1845) .....	32, 39, 46
Chessman v. Teets, 239 F.2d 205 (9th Cir. 1956) .....	49
Clark v. Superior Court, 190 Cal.App.2d 739, 12 Cal.Rptr. 191 (1961) .....	27
Duignan v. United States, 274 U.S. 195 (1927) .....	15
Estep v. United States, 251 F.2d 579 (5th Cir. 1958) ....	49, 70
Estes v. Texas, 381 U.S. 532 (1965) .....	37
Ex parte Fiske, 113 U.S. 713 (1885) .....	64
Ex parte Rowland, 104 U.S. 604 (1881) .....	40



	Pages
Fay v. Noia, 372 U.S. 391 (1963) .....	23, 27, 38, 65
Fisher v. Baker, 203 U.S. 174 (1906) .....	65
Fortner v. Balkecom, 380 F.2d 816 (5th Cir. 1967) .....	46, 69
Goldsmith v. Valentine, 36 App. D.C. 63 (1910) .....	65
Gordon v. United States, 344 U.S. 414 (1953) .....	27
Hamilton v. Hunter, 65 F.Supp. 319 (D.Kan. 1946) .....	49, 70
Hammerer v. Huff, 110 F.2d 113 (D.C. Cir. 1939) .....	49, 69
Hardison v. Dunbar, 256 F.Supp. 412 (N.D.Cal. 1966) ....	50
Harris v. North Carolina, 240 F.Supp. 985 (E.D.N.C. 1965) .....	36, 69
Harrison v. Northern Trust Co., 317 U.S. 476 (1943) .....	50
Hickman v. Taylor, 329 U.S. 495 (1947) .....	22, 44
Holiday v. Johnston, 313 U.S. 342 (1941) .....	18, 22, 24, 25, 31, 38, 46, 51, 56, 57, 60
Hunter v. Thomas, 173 F.2d 810 (10th Cir. 1949) ....	51, 59, 71
In re McShane, 235 F.Supp. 262 (N.D.Miss. 1964) .....	50, 70
In re Shephard, 3 F. 12 (E.D.N.Y. 1880) .....	42, 43
Irvine v. California, 347 U.S. 128 (1954) .....	16, 17
Jencks v. United States, 353 U.S. 657 (1957) .....	27
Kamen Soap Prods. Co. v. United States, 110 F.Supp. 430 (Ct. Cl. 1953) .....	43
Knowles v. Gladden, 378 F.2d 761 (9th Cir. 1967) .....	21
Knowles v. Gladden, 254 F.Supp. 643 (D.Ore. 1965). ....	20, 36, 50, 71, 73,
Lawn v. United States, 355 U.S. 339 (1958) .....	15, 16
Local 1976, Carpenters' Union v. NLRB, 357 U.S. 93 (1958)	16
Lyles v. Beto, 32 F.R.D. 248 (S.D.Tex. 1963) .....	49
Macomber v. Hudspeth, 115 F.2d 114 (10th Cir. 1940), cert denied, 313 U.S. 558 (1941) .....	69, 72
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) .....	40
McGarrah v. Dutton, 381 F.2d 161 (5th Cir. 1967) .....	50
Miner v. Atlass, 363 U.S. 641 (1960) .....	22, 30, 33, 35, 37, 38, 47, 50, 61
Molignaro v. Dutton, 373 F.2d 729 (5th Cir. 1967) .....	49, 69

# TABLE OF CASES CITED

v

	Pages
Namet v. United States, 373 U.S. 179 (1963) .....	16
Neely v. Eby Constr. Co., 386 U.S. 317 (1967) .....	16
O'Keith v. Johnston, 129 F.2d 889 (9th Cir.), cert. denied, 317 U.S. 681 (1942) .....	69
Olson Rug Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961) .....	43
People v. Lindsay, 227 Cal.App.2d 482 (1964), limited on unrelated issue, People v. Haston, 69 A.C. 237, 444 P.2d 91, 70 Cal.Rptr. 419 (1968) .....	27
Peyton v. Rowe, 391 U.S. 54 (1968) .....	4
Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376 (1960) .....	16
Price v. Johnston, 334 U.S. 266 (1948) .....	45, 47
Re Smart Infants, 12 Ont. Pr. R. 2 (1887) .....	61
Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) .....	46, 47
Rogers v. Bennett, 320 F.2d 83 (8th Cir. 1963) .....	49, 69
Schiebelhut v. United States, 318 F.2d 785 (6th Cir. 1963) .....	36, 49, 70
Sheppard v. Maxwell, 384 U.S. 333 (1966) .....	37
Shores v. United States, 174 F.2d 838 (8th Cir. 1940) ....	31
Smith v. United States, 174 F.Supp. 828 (S.D.Cal. 1959), appeal dismissed as untimely, 272 F.2d 228 (9th Cir. 1959), cert. denied, 362 U.S. 954 (1960) .....	36, 49, 70, 73
Stern v. South Chester Tube Co., 390 U.S. 606 (1968) ....	40
Sullivan v. Dickson, 283 F.2d 725 (9th Cir.), cert. denied, 366 U.S. 951 (1961) .....	36, 49, 69
Sullivan v. United States, 198 F.Supp. 624 (S.D.N.Y. 1961) .....	20, 28, 32, 51, 59, 70, 73
Tiberg v. Warren, 192 F. 458 (9th Cir. 1911) .....	71
Townsend v. Sain, 372 U.S. 293 (1963) .....	24
Tribune Review Publishing Co. v. Thomas, 120 F.Supp. 362 (W.D.Penn. 1954) .....	37
Turner v. Shackman, 27 F. 183 (1886) .....	64
United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947) .....	15
United States v. Burdette, 161 F.Supp. 326 (E.D.Mich. 1957), aff'd, 254 F.2d 610 (6th Cir. 1958), cert. denied, 359 U.S. 976 (1959) .....	50, 73

	Pages
United States v. Carter, 15 F.R.D. 367 (D.D.C. 1954) . . . .	42
United States v. Ferguson, 37 F.R.D. 6 (D.D.C. 1965) . . .	42
United States v. Hayman, 342 U.S. 205 (1952) . . . . .	41
United States v. Maryland & Va. Milk Producers Ass'n, 9 F.R.D. 509 (D.D.C. 1949) . . . . .	42
United States v. Murray, 297 F.2d 812 (2d Cir.), cert de- nied, 369 U.S. 828 (1962) . . . . .	32
United States v. Nolte, 39 F.R.D. 359 (N.D.Cal. 1965) . . .	31
United States v. Rothman, 179 F.Supp. 935 (W.D.Penn. 1959) . . . . .	32
United States v. Sherwood, 312 U.S. 584 (1941) . . . . .	61
United States v. Taylor, 25 F.R.D. 225 (E.D.N.Y. 1960) . .	31
United States v. Wilbur, 283 U.S. 414 (1931) . . . . .	40
United States v. Williams, 37 F.R.D. 24 (S.D.N.Y. 1965) . .	31
United States ex rel. Bruno v. Herold, 39 F.R.D. 570 (N.D. N.Y.), rev'd on other grounds, 368 F.2d 187 (2d Cir., 1966) . . . . .	49, 70
United States ex rel. Goldsby v. Harpole, 249 F.2d 417 (5th Cir. 1957), cert. denied, 361 U.S. 850 (1959) . . . . .	50
United States ex rel. International Contracting Co. v. La- mont, 155 U.S. 303 (1894) . . . . .	40
United States ex rel. Jelic v. District Director of Immigra- tion, 106 F.2d 14 (2d Cir. 1939) . . . . .	50, 54
United States ex rel. McCann v. Adams, 3 F.R.D. 396 (S.D. N.Y. 1944) . . . . .	50
United States ex rel. Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), cert. denied, 372 U.S. 915 (1963) . . . . .	36, 49, 70, 72
United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953) . .	65
United States ex rel. Tillery v. Cavell, 294 F.2d 12 (3d Cir. 1961), cert. denied, 370 U.S. 945 (1962) . . . . .	69
Urbano v. Sondern, 41 F.R.D. 355 (D. Conn.), aff'd, 370 F.2d 13 (2d Cir. 1966) . . . . .	28
Walker v. Johnston, 312 U.S. 275 (1941) 18, 25, 26, 38, 46, 59, 60, 70	
Watts, Watts & Co. v. Unione Austriaca di Navigazione, 248 U.S. 9 (1918) . . . . .	16
Weller v. Dickson, 314 F.2d 598 (9th Cir.), cert. denied, 372 U.S. 845 (1963) . . . . .	27, 29
Williams v. Babineaux, 357 F.2d 481 (5th Cir. 1966) . . . .	69
Wilson v. Harris, 378 F.2d 141 (9th Cir. 1967) 10, 14, 51, 59, 71, 73	
Wilson v. Weigel, 387 F.2d 632 (9th Cir. 1967) . . . . .	30, 50, 70, 73

**Congressional Documents**

Pages

Hearings on H.R. 8892 Before the House Comm. on the Judiciary, 75th Cong., 3d Sess., ser. 17 (1938) .....	53, 55
H. R. Rep., No. 2743, 75th Cong., 3d Sess. (1938) .....	38
H. R. Rep., No. 1892, 89th Cong., 2d Sess. (1966) .....	27
S. Rep., No. 1527, 80th Cong., 2d Sess. (1948) .....	19

**Texts and Other Authorities**

ABA, Proceedings of the Institute on Federal Rules of Civil Procedure at Washington, D.C., and of the Symposium at New York City (1938) .....	53
J. Adams, Equity (8th ed., Ralston rev., 1890) .....	64, 65
Advisory Comm. on Rules for Civil Procedure, Preliminary Draft (May 1936) .....	52, 58
Advisory Comm. on Rules for Civil Procedure, Report (April 1937) .....	52, 58
W. Bailey, Habeas Corpus and Special Remedies (1913) ..	61
Ballentine's Law Dictionary (2d student ed. 1931) .....	21
2A W. Barron & A. Holtzoff, Federal Practice and Procedure (Wright rev. 1961) .....	44, 63, 64
G. Bispham, Equity (10th ed., McCoy rev., 1925) .....	64, 65
Black's Law Dictionary (4th ed. 1951) .....	20
3 W. Blackstone, Commentaries (1768) .....	40, 41
E. Bray, Discovery (1885) .....	62
W. Church, Habeas Corpus (2d ed. 1893) .....	19, 61
2 E. Daniell, Chancery Pleading and Practice (6th Am. ed., Gould rev., 1894) .....	65
J. Eaton, Equity Jurisprudence (2d ed., Throckmorton rev., 1923) .....	65

	Pages
Edmunds, "New Federal Rules of Civil Procedure," 4 John Marshall L.Q. (1938-39) .....	55
F. Ferris & F. Ferris, Jr., Extraordinary Legal Remedies (1926) .....	61
N. Fetter, Equity Jurisprudence (1895) .....	65
W. Fletcher, Equity Pleading and Practice (1902) .....	66, 68
Galston, "An Introduction to the New Federal Judicial Code," 8 F.R.D. (1949) .....	20
Hammond, "Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure," 23 A.B.A.J. (1937) .....	52
T. Hare, Discovery (3d Am. ed. 1850) .....	62
Hopkinson, "New Federal Rules of Civil Procedure compared with Former Federal Equity Rules and the Wisconsin Code," 23 Marq. L. Rev. (1938) .....	56, 58
R. Hurd, Habeas Corpus (2d ed. 1876) .....	61
W. Kerr, Discovery (1870) .....	62
Longsdorf, "The Federal Habeas Corpus Acts Original and Amended," 13 F.R.D. (1953) .....	20
E. Merwin, Equity (H. Merwin ed. 1896) .....	66, 68
Note, "Civil Discovery in Habeas Corpus," 67 Colum. L. Rev. (1967) .....	57
Note, "Multiparty Federal Habeas Corpus," 81 Harv. L. Rev. (1968) .....	57, 58
Parker, "Limiting the Abuse of Habeas Corpus," 8 F.R.D. (1949) .....	20
C. Peile, Discovery (1883) .....	62
Pike, "The New Federal Rules of Civil Procedure," 12 Calif. State B.J. (1937) .....	58
1 J. Pomeroy, Equity Jurisprudence (5th ed., Symonds rev., 1941) .....	64, 66, 67



# TABLE OF OTHER AUTHORITIES CITED

ix

	Pages
D. Prem, Habeas Corpus (1950) .....	61
Proceedings of the Institute on Federal Rules of Criminal Procedure (N.Y.U. School of Law, Institute Proceedings, Vol. VI, Holtzoff ed., 1946) .....	42
G. Ragland, Jr., Discovery Before Trial (1932) .....	62
R. Ross, Discovery (1912) .....	62
J. Scott & C. Roe, Habeas Corpus (1923) .....	61
2 T. Spelling, Injunctions and Extraordinary Remedies (1901) .....	61
3 J. Story, Equity Jurisprudence (14th ed., Lyon ed., 1918) .....	64, 66, 68
J. Story, Equity Pleadings (10th ed., Gould rev., 1892) ....	66
Sunderland, "The New Federal Rules," 45 W. Va. L.Q. (1938) .....	44, 63, 64, 66, 67, 68
Superintendent of Documents, Monthly Catalog of United States Public Documents (1936) .....	58
Superintendent of Documents, Monthly Catalog of United States Public Documents (1937) .....	58
J. Wigram, Discovery (2d ed. 1840) .....	62

## Federal Rules of Civil Procedure

Rule 1 .....	38, 45, 48
Rule 26(a) .....	21
Rules 26-37 .....	47
Rule 45 .....	47
Rule 81(a) .....	48, 55
Rule 81(a)(1) .....	38, 45
Rule 81(a)(2) .....	47, 48
Rule 81(a)(5) .....	43

## TABLE OF OTHER AUTHORITIES CITED

## Federal Rules of Criminal Procedure

Pages

Rule 16 .....	31, 38
Rule 17 .....	47
Rule 54 .....	43, 47, 57

## United States Code

28 U.S.C. § 1651(a) .....	39, 41
28 U.S.C. § 2072 .....	38, 55
28 U.S.C. § 2241 .....	38
28 U.S.C. § 2242 .....	26, 38
28 U.S.C. § 2243 .....	18, 38
28 U.S.C. § 2244 .....	38
28 U.S.C. § 2245 .....	19, 25, 38
28 U.S.C. § 2246 .....	19, 25, 28, 38, 39, 46, 59, 62
28 U.S.C. § 2247 .....	19, 25, 38
28 U.S.C. § 2248 .....	19, 38
28 U.S.C. § 2249 .....	19, 25, 38
28 U.S.C. § 2250 .....	38
28 U.S.C. § 2251 .....	38
28 U.S.C. § 2252 .....	38
28 U.S.C. § 2253 .....	38
28 U.S.C. § 2254 .....	25, 38

## Supreme Court Rules

Rule 23(1)(c) .....	16
Rule 23(1)(h) .....	17

# **In the Supreme Court**

OF THE  
**United States**

---

OCTOBER TERM, 1968

---

No. 199

---

GEORGE B. HARRIS, Judge of the United States  
District Court for the Northern District of California,  
*Petitioner,*

vs.

LOUIS NELSON, Warden, California  
State Prison at San Quentin,  
*Respondent.*

---

## **BRIEF FOR RESPONDENT,**

Joined In and Adopted by the States of Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, and Wisconsin, The Territory of Guam, and The National District Attorneys' Association, Appearing as Amici Curiae.

### OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Wilson v. Harris*, 378 F.2d 141 (9th Cir. 1967).

---

### JURISDICTION

The jurisdiction of this Court arises under title 28, United States Code, section 1254(1). The petition for a writ of certiorari was granted on June 17, 1968. 392 U.S. 925.

---

### STATUTES AND RULES INVOLVED

Relevant statutes and certain of the Federal Rules of Civil Procedure are set forth in the Appendix.

---

### QUESTIONS PRESENTED

Does a United States District Court Judge have the authority to order the custodian-warden of a state prisoner to respond to discovery interrogatories served in a federal habeas corpus proceeding brought by the prisoner to challenge his state criminal conviction?

1. Is the use of discovery interrogatories in habeas corpus proceedings authorized by the "hearing" requirement of title 28, United States Code, section 2243, and the decisions of this Court?

2. Does a district court have the inherent power to authorize the use of discovery interrogatories in habeas corpus proceedings?
3. Does title 28, United States Code, section 1651(a), afford to a district court a basis for authorizing the use of discovery interrogatories in habeas corpus proceedings?
4. Do the provisions of Rule 33 of the Federal Rules of Civil Procedure, authorizing the use of discovery interrogatories, apply to proceedings in habeas corpus?

---

#### **STATEMENT OF THE CASE**

At the time that Alfred Walker, the real party in interest, initiated the habeas proceeding before the United States District Court in which he attempted to utilize the discovery-interrogatory procedures which are at issue herein, he was confined in the California State Prison at San Quentin, California, pursuant to a judgment and commitment of the Superior Court of the State of California for the County of Alameda, No. 35252 in the files of that court, dated December 10, 1963, and sentencing him to state prison for the term prescribed by law for the offense of possession of marijuana for sale. This judgment and commitment reflects two prior felony convictions.<sup>1</sup>

---

<sup>1</sup>Since this proceeding was initiated the real party in interest has acquired a felony conviction for possession of marijuana. On November 27, 1967, he was convicted by jury in the Alameda County Superior Court and was subsequently sentenced to state prison. This conviction was based on an offense which occurred



Following this conviction, the real party in interest took an appeal to the California Court of Appeal for the First Appellate District. On October 15, 1964, that court filed an opinion affirming his conviction. A copy of that opinion, which is not published in the official reports, is attached as part of the appendix to this brief. The facts and circumstances upon which the conviction is based are reflected in the opinion of the California Court of Appeal as follows:

"At approximately 12:30 p.m. on August 9, 1963, Edward Hilliard, an Oakland police officer attached to the Vice Control Section, received a telephone call from a female informant. The officer had known the informant, a special employee of the section, for two years. He considered her a reliable informant and testified that she had previously furnished him with information leading to the arrest and conviction of at least one person.

"On this occasion, the informant reported that she had met a man who had just come to Oakland from San Francisco and who had five bags of marijuana for sale. Although she did not know the man's name, she stated that he had taken Room 3 at the Dunbar Hotel, and that he intended to sell the marijuana as soon as possible and return to San Francisco.

"Upon receiving this information, Hilliard instructed the informant to meet him near the

---

after the District Court on May 15, 1967, ordered him released from state prison and placed under the jurisdiction of the federal probation office pending final disposition of his petition for federal habeas relief. Whether this new conviction with its concurrent sentence moots his habeas petition is not clear. *Peyton v. Rowe*, 391 U.S. 54 (1968), dealt with consecutive sentences.

Dunbar Hotel. He and Officer Walker then proceeded to the agreed location, furnished the informant with a \$20 bill, the serial number of which had been recorded, and instructed her to go to Room 3 of the hotel and attempt to make a purchase of marijuana from the person in question. No attempt to search the informant was made.

"The informant then drove to the hotel in her own car, with the officers following at a distance in another car. She entered the hotel and remained out of sight of the officers for approximately five minutes. Upon emerging from the hotel, she got into her car and drove to a pre-arranged spot, with the officers following. She then gave Hilliard a brown paper bag containing a vegetable substance which he took to be marijuana. The informant stated that she had purchased the bag from the man who was in bed in Room 3. She further stated that he had taken it from a larger bag which was under the mattress and which contained several other small bags. The officers did not search the informant to see if she still had the \$20 bill in her possession.

"The officers then returned to the Dunbar hotel, and Hilliard proceeded to Room 3 while Walker remained on the street where he could observe the window of said room. After Hilliard had knocked repeatedly on the door of the room without receiving any response, he went to the hotel manager's room to obtain a key. The manager then accompanied Hilliard and Walker to Room 3 and unlocked the door. Appellant was asleep in bed. Hilliard awakened him and identified himself as a police officer. Upon observing cer-

tain scars on the inside of appellant's elbows, Hilliard inquired as to their nature, and appellant replied that he had been using Percodan, a synthetic narcotic, for the last five days. Upon further questioning, he admitted that he had obtained the Percodan without a prescription. When asked whether he had Percodan or the equipment for injecting it in the hotel room, appellant replied in the negative, stating that he had used it up. The officer then asked if he could look around the room, and appellant replied, 'Sure, go ahead and look. There is nothing here.'

"After placing appellant under arrest for the illegal use of narcotics, Hilliard lifted the mattress on the bed and recovered a brown paper bag which contained four small bags, three cigarettes, and a package of wheat straw papers. The cigarettes and the contents of the four small bags were subsequently analyzed and found to be marijuana. When Hilliard showed these items to appellant, he stated that he had discovered the large bag under the mattress when he rented the room. When asked what he intended to do with it, he replied that he wanted to sell it to make some money. Although appellant was searched by the officers, the \$20 bill which had been given to the informant was never found."

On his appeal the real party in interest challenged the search which produced the narcotics which were introduced in evidence against him during his trial in the superior court. That issue was resolved by the California Court of Appeal as follows:

"Appellant does not challenge the sufficiency of the evidence, but contends that the judgment

should be reversed because evidence that was obtained by an illegal search and seizure was erroneously admitted. He asserts, more specifically, that he never gave his free and voluntary consent to the search of his hotel room, and that said search cannot be deemed incidental to a lawful arrest because the police lacked reasonable cause for such arrest and relied solely upon information supplied by an informant who was not searched before and after she allegedly purchased marijuana from appellant and who was not kept under constant surveillance so as to exclude the possibility of her having obtained it from another source.

"This argument is wholly without merit, and is apparently based upon the erroneous assumption that evidence of information supplied by an informant cannot constitute reasonable cause for an arrest unless such evidence is in itself sufficient to support a conviction.

"It is settled that information from a reliable informant is sufficient to sustain a finding that an arrest was made with reasonable cause and that such information need not be confined to evidence which would be admissible at the trial on the issue of guilt. (*People v. Prewitt* (1959) 52 Cal.2d 330, 337; *People v. Gonzalez* (1956) 141 Cal.App.2d 604, 606; *Trowbridge v. Superior Court* (1956) 144 Cal.App.2d 13, 17.) In the present case, Officer Hilliard testified that the informant had served as a special employee of the Oakland Police Department for two years, that he considered her reliable, and that she had in the past provided information which led to the arrest and conviction of at least one person. Under such

circumstances, the officer's failure to search her before and after she entered the hotel and to keep her under surveillance at all times did not render valueless the information furnished by her. In view of her known reliability, the officer was clearly justified in believing the information which she gave him and in arriving at the reasonable conclusion that the occupant of Room 3 was offering marijuana for sale. Since the officer accordingly had reasonable cause for arresting appellant (Pen. Code, § 836), it follows that a search incidental to such arrest was entirely proper (*People v. Dixon* (1956) 46 Cal.2d 456, 458-459), and it is unnecessary to determine whether appellant freely consented thereto." (Footnote omitted.)

On November 22, 1965, the real party in interest filed an application for habeas corpus relief with the United States District Court for the Northern District of California in which he challenged the validity of his confinement at San Quentin State Prison under this 1963 conviction in the Alameda County Superior Court. The principal issue presented by his application related to the validity of the search which produced the evidence used against him in his state trial. The District Court issued an order to show cause on the same date. A return to the order to show cause was filed on December 21, 1965, and on March 16, 1966, the District Court appointed counsel to represent petitioner, noting in that order that it appeared that an evidentiary hearing might be required. On August 15, 1966, counsel for the real party in interest



moved for and was granted an order directing an evidentiary hearing to resolve various issues relating to the validity of the conviction. The salient issue presented by his motion related to the validity of the search and in particular the reliability of the informant.

On October 20, 1966, at a time when the evidentiary hearing in the habeas proceeding was set for October 28, 1966, counsel for the real party in interest served upon counsel for the warden a set of interrogatories directed to the reliability of the informant (A 34-35). For example, he asked that the warden detail the previous instances in which the informant had supplied information to the arresting officer which formed the basis for an arrest or search. In a prefatory paragraph he asked that the warden "answer under oath, in writing, in accordance with Rules 33 and 81(a)(2) of the Federal Rules of Civil Procedure, each of the interrogatories set forth" (A 34).

On October 21, 1966, there came on for hearing before the District Court an application submitted by counsel for the real party in interest for an order shortening the time within which the warden could respond to or object to the interrogatories. At the same hearing the warden presented objections to the interrogatories on the grounds that interrogatories for purposes of discovery are not authorized in a federal habeas proceeding (A 36-38). The District Court denied the warden's objections to the interrogatories and directed him to answer them on or before October 26, 1966 (A 39).

On October 26, 1966, the warden submitted to the United States Court of Appeals for the Ninth Circuit an application for mandamus and/or prohibition, and that court issued an order the same day, staying the District Court from enforcing the order directing the warden to answer the interrogatories, and directing the District Court to show cause why a writ of mandamus and/or prohibition should not issue.

Thereafter, the matter was briefed and argued before the Court of Appeals. On May 10, 1967, the Court of Appeals filed its opinion which vacated the District Court order authorizing the interrogatories directed to the warden. *Wilson v. Harris*, 378 F.2d 141 (9th Cir. 1967) (set out in A 40-44).

---

### SUMMARY OF ARGUMENT

The Court of Appeals correctly held that neither the Habeas Corpus Act nor the Federal Rules of Civil Procedure, separately or together, authorize a federal district court judge to order the custodian-warden of a state prisoner to respond to discovery interrogatories served in the prisoner's federal habeas corpus proceeding.

I. In his brief before this Court, petitioner presents four distinct and separate arguments: that authority to order such discovery interrogatories is implicit in the hearing requirement of title 28, United States Code, section 2243; that a district court has inherent power to authorize such discovery; that such

discovery is authorized by the All Writs Statute; and that such discovery is authorized by the Federal Rules of Civil Procedure. The first three issues were not raised in the Court of Appeals. Furthermore, the third was brought into the case after certiorari was granted. This Court, since it functions as a court of review, should disregard these three issues.

II. Discovery interrogatories in habeas corpus are not authorized either by the "hearing" requirement of section 2243 or by decisions of this Court. Section 2243 does not give a district court a carte blanche in habeas corpus, for these proceedings are regulated by statute. Section 2246 limits the use of depositions and interrogatories to evidentiary purposes. Since discovery is a significant procedural innovation tantamount to a substantive doctrine, such a radical change in habeas proceedings cannot be effected without a definite congressional sanction. Nor has discovery in federal habeas been authorized by any opinion of this Court.

Petitioner's paradoxical claim that prisoners must "speculate" as to the defects in their convictions and suffer "surprise" if denied discovery in aid of their petitions is but circular reasoning. Section 2242 requires the applicant to allege the facts under oath. If he can only "speculate," then he has no basis for filing a petition in the first place. Nothing in the Habeas Corpus Act even remotely suggests a congressional intention to authorize court-sanctioned fishing expeditions in hopes of finding some defect. Since such discovery procedure is not available to a pre-

sumptively innocent defendant pending criminal trial in federal or state courts, it is eminently reasonable to deny its use to a prisoner confined pursuant to a presumptively valid conviction.

III. A district court does not have "inherent power" to authorize discovery interrogatories in a habeas corpus proceeding. The inferior courts of the United States are created by statute and have no inherent powers. Though they have the power, implicit in their office, to regulate internal administrative procedure and decorum, discovery is neither. The implementation of discovery techniques is of such momentous import as to require exacting observance of the limitations upon the judicial rule-making power. This is especially true in habeas corpus where procedure has been traditionally governed by statute.

IV. The "all writs" statute does not provide a district court with a basis for authorizing discovery interrogatories in a habeas corpus proceeding. A prisoner has no right to require that he be informed concerning possible shortcomings or defects in his conviction. Nor can mandamus establish that duty, for the function of that writ is to compel performance of an existing duty, not to create a new one. A subpoena *ad testificandum* cannot be used for discovery since it only requires the witness to appear at trial, not before. The subpoena *duces tecum* is similarly inappropriate since it only compels the witness to produce documents at trial. Had such traditional writs been suitable for discovery, none of the discovery rules now in force would have been necessary.

Nor can these traditional writs be "expanded" to the point of unrecognizable mutation. The judicial writ power is confined within the congressional framework established to regulate the proceeding in which that power is exercised. The "all writs" statute does not give a district judge license to thwart the congressional policy set out in the Habeas Corpus Act.

V. When the legislative history of Rule 81(a)(2) is examined, it becomes apparent that the framers of the Civil Rules intended them to have only a very limited applicability to habeas corpus proceedings. The discovery provisions of the Federal Rules of Civil Procedure were never intended to apply.

Rule 81(a)(2) sets out two conditions which must be met before a particular rule can be extended to habeas corpus. Neither criterion can be met with respect to the rules relating to discovery. The first cannot be satisfied because the practice insofar as depositions and interrogatories are concerned is set forth in the Habeas Corpus Act, which restricts them to evidentiary purposes. The second condition cannot be met because discovery was not part of habeas practice prior to adoption of the Civil Rules. No cases or texts suggest that discovery was available in habeas. Indeed, discovery was not available in any federal actions other than suits in equity, and equity rules were inappropriate to habeas corpus.



**ARGUMENT****I**

**PETITIONER CANNOT NOW RAISE QUESTIONS WHICH WERE NEITHER PRESENTED TO THE COURT OF APPEALS NOR CONTAINED IN THE PETITION FOR CERTIORARI.**

The interrogatories which the real party in interest served upon respondent in the District Court were propounded "in accordance with Rules 33 and 81(a)(2) of the Federal Rules of Civil Procedure" (A 34). In *Wilson v. Harris*, 378 F.2d 141 (9th Cir. 1967) (reprinted in A 40-44), the only issues presented to the Court of Appeals were whether the discovery-interrogatory procedures of Rules 26 and 33 were inapplicable to habeas corpus proceedings pursuant to Rule 81(a)(2), and whether interrogatories for the purpose of discovery were authorized by title 28, United States Code, section 2246. In the petition for certiorari, the decision of the Court of Appeals was challenged on the grounds that discovery was authorized by the "hearing" requirement of title 28, United States Code, section 2243, and the decisions of this Court (Petition, pp. 3-5), that the interpretation of Rule 81(a)(2) was erroneous (Petition, pp. 5-8), and that the holding annulled the inherent powers of the district courts (Petition, pp. 8-9).

In urging that the District Court had the power to order discovery interrogatories in a habeas corpus proceeding, petitioner now makes the following claims in his brief:

(a) Discovery is authorized by the "hearing" requirement of title 28, United States Code, sec-

tion 2243, and the decisions of this Court (Petitioner's Brief, pp. 6, 8-12);

(b) A district court has the inherent power to order discovery (Petitioner's Brief, pp. 6, 12-18);

(c) Discovery may be ordered under title 28, United States Code, section 1651(a) (Petitioner's Brief, pp. 6-7, 18-22); and

(d) Rule 81(a)(2) does not render the discovery-interrogatory procedures of the Federal Rules of Civil Procedure inapplicable to proceedings in habeas corpus (Petitioner's Brief, pp. 7, 23-35).

Of these four issues, the first three were not raised either in the District Court or the Court of Appeals. Pursuant to the rules and in accordance with the prior decisions of this Court, these three claims should not be considered.

This Court has steadfastly adhered to the proposition that it is a court of review and will not determine questions neither decided by nor submitted to the court below. *Lawn v. United States*, 355 U.S. 339, n. 16 at 362-63 (1958); *Duignan v. United States*, 274 U.S. 195, 200 (1927). "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn v. United States*, *supra*, 355 U.S., n. 16 at 362; accord, *Duignan v. United States*, *supra*. There are no exceptional circumstances here. Compare *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947) cited in *Lawn v. United States*, *supra*; *Ashcraft v. Tennessee*, 322 U.S. 143,

155-56 (1943); *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 248 U.S. 9, 21 (1918). Because petitioner failed to raise them below, the first three questions in his brief should not be considered.

There is still another reason why this Court should not examine the third issue now presented in the petitioner's brief. Supreme Court Rule 23(1)(c) provides that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." The rule has been uniformly invoked when the petitioner's brief raises questions not found in the petition. *Namet v. United States*, 373 U.S. 179, 190 (1963); *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, n. 12 at 387 (1960); *Local 1976, Carpenter's Union v. NLRB*, 357 U.S. 93, n. 1 at 96 (1958); *Lawn v. United States*, 355 U.S. 339, n. 16 at 363 (1958); *Irvine v. California*, 347 U.S. 128, 129 (1954); cf. *Neely v. Eby Constr. Co.*, 386 U.S. 317, n. 3 at 321 (1967).

Nor can petitioner evade the requirements of Rule 23(1)(c) by claiming that the third question was "fairly comprised" in the petition for certiorari. The petition raised a single question: "Is a United States District Court Judge without jurisdiction to order discovery by way of written interrogatories in habeas corpus proceedings?" (Petition, p. 1) Petitioner did not rely upon title 28, United States Code, section 1651(a), but instead invoked the "inherent power" of the courts, the Federal Rules of Civil Procedure, and claimed that discovery was necessary for a meaningful hearing (Petition, pp. 3-9). Certainly a petitioner

cannot be permitted to raise every conceivable claim of error merely by positing a single, broad question which assumes the form: "Should the decision be reversed?" Such a practice conforms neither to the letter nor the spirit of Rule 23. A petitioner must be limited to those issues arising out of the questions presented in his petition, as those questions are framed through the arguments made in support of that petition under Rule 23(1)(h). Anything less reduces the petition to the office of a stalking-horse, and promises this Court a litter of pigs in every poke. In *Irvine v. California*, 347 U.S. 128, 129 (1954), this Court declared, "We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition. . . ." Since petitioner now attempts the same maneuver condemned in *Irvine*, he should be similarly limited to those questions actually contained in his petition for certiorari and this Court should decline consideration of the third question presented in his brief.

## II

**AUTHORIZATION FOR DISCOVERY INTERROGATORIES IN  
HABEAS CORPUS CANNOT BE FOUND IN THE "HEARING"  
REQUIREMENT OF SECTION 2243.**

Petitioner claims that discovery interrogatories in habeas corpus are authorized by the "hearing" requirement of title 28, United States Code, section 2243, as that requirement has been interpreted by decisions of this Court (Petitioner's Brief, pp, 6, 8-12). The portion of section 2243 upon which he relies states: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." It is his contention that implicit in this provision is an authorization for district courts to order discovery to make such hearings more "meaningful." Assuming, *arguendo*, that petitioner may here broach this issue for the first time, the proposition is without credible foundation.

Section 2243 does not give a district court a carte blanche in habeas corpus proceedings. Nor do the decisions of this Court permit a district judge to create his own procedural devices, for it has been repeatedly acknowledged that proceedings in federal habeas corpus are confined within the framework of the statutory scheme. *Brown v. Allen*, 344 U.S. 443, 460-61 (1953); *Holiday v. Johnston*, 313 U.S. 342, 350-51 (1941); *Walker v. Johnston*, 312 U.S. 275, 283-84 (1941).



**A. The Habeas Corpus Act authorizes the use of depositions and interrogatories only for evidentiary purposes.**

Congress has established definitive guidelines which control the district courts in conducting evidentiary hearings. 28 U.S.C. §§ 2245-49 (1964). Section 2246 provides:

“On application for a writ of habeas corpus evidence may be taken orally or by deposition, or in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.”

This section was designed to facilitate the presentation of reliable evidence. The history of the writ reveals that one of the most common forms of evidence presented to the federal courts was the affidavit. W. CHURCH, *HABEAS CORPUS* §§ 207-20 (2d ed. 1893). Since these affidavits were taken *ex parte* and were not subject to the scrutiny of cross-examination, they were considered of dubious value in determining factual issues. *Id.*, § 207. It is evident from the comments of those persons who wrote section 2246 that the provisions for interrogatories was intended to remedy the defective nature of an *ex parte* affidavit. Senator Alexander Wiley of the Senate Committee on the Judiciary revealed this rationale for the provision: “The purpose of this section is to facilitate the taking of evidence by permitting the use of affidavits *with proper safeguards*.” S. Rep., No. 1527, 80th Cong., 2d Sess. 2 (1948) (emphasis added). The Honorable John J. Parker, Chairman of the Judicial Conference Committee which drafted the Habeas Corpus Act, de-

clared, "Section 2246 provides for the use of affidavits in hearings with the right to the opposite party to propound written interrogatories to the affiants or file answering affidavits." Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 174 (1949). Other commentaries also indicate that the statutory procedures were restricted to depositions or interrogatories taken for the purposes of evidence. The Honorable Clarence G. Galston, a member of the Judicial Conference Committee on Revision of the Judicial Code, observed, "Section 2246 likewise is intended to clarify existing practice in respect to the taking of evidence, orally or by depositions. . . ." Galston, *An Introduction to the New Federal Judicial Code*, 8 F.R.D. 201, 205 (1949). George Longsdorf, a consultant to the Advisory Committee on Revision of the Federal Criminal Code and a member of the Advisory Committee on the Federal Rules of Criminal Procedure, also regarded the section as pertaining to matters of evidence: "§ 2246 provides for taking evidence upon the application orally or by deposition." Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407, 418 (1953). On the basis of these authorities, then, it becomes apparent that the proper interpretation<sup>2</sup> of section 2246 was made in *Sullivan*

<sup>2</sup>A wholly erroneous construction of this provision was made in *Knowles v. Gladden*, 254 F.Supp. 643 (D. Ore. 1965). In that case, Judge Kilkenny observed that section 2246 was not enacted until ten years after Federal Rule of Civil Procedure 81(a)(2) had become effective. *Id.*, n. 3 at 254 and accompanying text. He therefore concluded that "deposition," as used in section 2246, must be given the "well known legal meaning" which he felt appeared in the Federal Rules; to include depositions for purposes of discovery. *Id.* at 644-45. But the "well known legal meaning" of "deposition" hardly equates "deposition" with "depo-

*v. United States*, 198 F.Supp. 624, 626 (S.D.N.Y. 1961):

"The provision for deposition evidence in the first sentence of that statute relates, again, not to the discovery depositions (which may be oral or by interrogatories) but to depositions intended to be used as testimonial evidence at a hearing upon the habeas corpus application. The deposition contemplated is that of a specified witness upon an open commission."

Section 2246 thus assures the admission of trustworthy evidence, for: (1) evidence can always be tested if presented orally, since the witness is before the court and subject to cross-examination; (2) evidence can be tested if offered in deposition form, since the deposition can be taken only upon notice to the adverse party who then has an opportunity to cross-examine the deponent; and (3) evidence can be tested when submitted in affidavit form, since the adverse party has the "right to propound written interrogatories to the affiants, or to file answering affidavits."

---

sition for purposes of discovery." A deposition is merely a written statement taken under oath and upon notice to an adverse party, thus permitting the opponent to test the testimony via cross-examination or its equivalent. *BALLENTINE'S LAW DICTIONARY* 240 (2d student ed. 1931); *BLACK'S LAW DICTIONARY* 527 (4th ed. 1951). Even the rules themselves note that depositions may be used "for the purpose of discovery or for use as evidence in the action or for both purposes." *FED. R. CIV. P.* 26(a). This qualification would have been unnecessary if "deposition" had the "well known legal meaning" attributed to it by Judge Kilkenny.

*Knowles v. Gladden*, 378 F.2d 761 (9th Cir. 1967), affirms the district court's subsequent denial of the petition, not the decision on the discovery motion discussed above. This was apparently overlooked by petitioner (see Petitioner's Brief, pp. 16, 23, 31).

The limitation of depositions and interrogatories to matters of evidence by section 2246 is highly significant. Section 2246 was enacted in 1948, almost ten years after the Federal Rules of Civil Procedure were adopted. Had Congress deemed it wise to permit the use of these procedures for purposes of discovery, it would have been a simple task to add "for the purpose of discovery or for use as evidence" as was done in Rule 26(a). The failure to do so indicates that discovery procedures in habeas corpus proceedings were not authorized by Congress. Compare *Holiday v. Johnston*, 313 U.S. 342, 353 (1941). Similarly, the exemption of habeas corpus proceedings from the coverage of the Federal Rules under Rule 81(a)(2) also suggests that discovery was not envisioned in habeas corpus. Compare *Miner v. Atlass*, 363 U.S. 641, 648 (1960).

**B. Discovery is a significant innovation which should not be extended to habeas corpus without special congressional authorization.**

Not only do Rule 81(a)(2), section 2246, and the statutory framework of the Habeas Corpus Act forbid inferring discovery authorization from the "hearing" requirement of section 2243, but the significance of the discovery procedures themselves militate against it. This Court has observed that the discovery mechanism under Rules 26 to 37 "is one of the most significant innovations of the Federal Rules of Civil Procedure." *Hickman v. Taylor*, 329 U.S. 495, 500 (1947), quoted in *Miner v. Atlass*, 363 U.S. 641, 649 (1960). In *Miner v. Atlass*, *supra*, 363 U.S. at 649-50,

this Court emphasized the momentous nature of the "weighty and complex" matter of discovery:

"[T]he choice of procedures adopted to govern various specific problems arising under the system was in some instances hardly less significant than the initial decision to have such a system. It should be obvious that we are not here dealing either with a bare choice between an affirmative or negative answer to a narrow question, or even less with the necessary choice of a rule to deal with a problem which must have an answer, but need not have any particular one. Rather, the matter is one which, though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine. . . ."

This Court has previously refused to effect a significant change in habeas corpus "in the teeth" of statutory language suggesting otherwise. *Fay v. Noia*, 372 U.S. 391, 435 (1963). Similarly, in considering another proposal, this Court declared, "We are unwilling to conclude without a definite congressional direction that so radical a change was intended." *Brown v. Allen*, 344 U.S. 443, 450 (1953). In *Brown v. Allen*, *supra*, it was also noted that the suggestion "does not square with the other statutory habeas corpus provisions." Since the discovery proposed by petitioner does not square with section 2246 and would work a radical change in the face of that section, it is impermissible to infer discovery authorization from so tenuous a basis as the "hearing" requirement of section 2243.



C. No warrant for the use of discovery in habeas proceedings can be found in decisions of this Court.

Petitioner also relies upon the following sentence, which appears in footnote 19 of *Brown v. Allen*, *supra*, 344 U.S. at 464: "Of course, the other usual methods of completing a record in civil cases, such as a subpoena *duces tecum* and discovery, are generally available to the applicant and respondent." Yet whether discovery was applicable to proceedings in habeas corpus was neither at issue nor even discussed in the case, and the footnote cited no authority whatever for such a proposition. This Court has previously cautioned against assuming that habeas corpus procedures not at issue and "passed without notice" have been sanctioned. *Holiday v. Johnston*, 313 U.S. 342, 352 (1941). Consequently, the passing reference to discovery in footnote 19 is hardly authority for a radical and momentous change in habeas corpus procedure.

Nor does anything this Court said in *Townsend v. Sain*, 372 U.S. 293 (1963), suggest that civil discovery procedures are available in federal habeas proceedings. *Townsend* dealt solely with the power and duty of federal courts to conduct evidentiary hearings upon petitions submitted to them by state prisoners, not with procedural matters such as discovery. In discussing the scope of the district court's "plenary" power, this Court stated:

"The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for

a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew." *Id.* at 312 (emphasis added).

The "plenary" power is thus the "power of the federal courts to take testimony and determine the facts *de novo* . . . ." *Id.* at 311. *Townsend* provides no authority for the proposition that a district judge has the power to create whatever procedural devices he feels may be appropriate. To paraphrase this Court in *Townsend v. Sain*, *supra* at 312, the language of Congress, the history of the writ, and the decisions of this Court all make clear that the power of the district judge over habeas procedure is not absolute. See 28 U.S.C. §§ 2245-47, 2249, 2254(d); *Holiday v. Johnston*, 313 U.S. 342, 351-54 (1941); *Walker v. Johnston*, 312 U.S. 275, 284-87 (1941). Nothing in the Habeas Corpus Act suggests that the district courts have the power to fashion discovery procedures for habeas corpus proceedings. Contrary to petitioner's claim, *Townsend v. Sain*, *supra*, provides no such authority.

**D. Discovery would not enhance the reliability of the fact-finding process and would defeat the summary hearing provisions of the Habeas Act.**

Lastly, petitioner claims that, "Only through such interrogatories can surprise to the parties and the Court be avoided, and litigation of the issues proceed on the basis of fact rather than speculation" (Petitioner's Brief, p. 12). This is indeed an astounding

and self-contradictory paradox. The Habeas Corpus Act requires the petitioner to allege under oath the facts upon which he relies for relief. 28 U.S.C. § 2242 (1964). These allegations must establish a prima facie case before an order to show cause may be issued. *Brown v. Allen*, 344 U.S. 443, 502 (1953) (concurring opinion of Frankfurter, J., joined by majority of Court). At the hearing, the petitioner bears the burden of sustaining his allegations by a preponderance of the evidence. *Walker v. Johnston*, 312 U.S. 275, 286 (1941). Thus petitioner's basis for discovery creates an irreconcilable conflict with the statutory requirements, for if the applicant can only "speculate" as to whether the proceedings culminating in his detention were constitutionally defective, then he has no basis whatsoever for filing a petition in the first place. This absurdity creates a procedural impossibility. If he can only "speculate" as to the facts which might vitiate his detention, he cannot file a petition. 28 U.S.C. § 2242 (1964); *Brown v. Allen*, *supra*, 344 U.S. at 502 (concurring opinion of Frankfurter, J., joined by majority of Court). But if he cannot file a petition, he cannot ask for discovery.

These same statutory requirements also demonstrate the inapplicability of discovery to habeas proceedings, for they effect the congressional requirement that a prisoner must base his claim of unlawful detention upon facts within his knowledge. Nothing in the statutory framework even remotely suggests that Congress intended the Habeas Corpus Act to provide every prisoner with an unlimited opportunity to en-

gage in court-sanctioned fishing expeditions in hopes of finding some defect underlying his detention.<sup>3</sup> The allegation and verification requirements of section 2242 compel the conclusion that discovery contravenes those precepts at the very roots of the Habeas Corpus Act.

Nor would discovery be likely to enhance the reliability of the fact-finding process—in fact, the contrary is the only realistic forecast. This Court has previously noted that few habeas corpus petitioners ever sustain their allegations and secure a writ. *Fay v. Noia*, 372 U.S. 391, 440 (1963); *Brown v. Allen*, 344 U.S. 443, 510 (1953) (concurring opinion of Frankfurter, J., joined by majority of Court). Congress has also observed that the writ is frequently abused and that the petitioners are seldom successful. H.R. REP., No. 1892, 89th Cong., 2d Sess. 5 (1966). The attitude of many members of the bench concerning the veracity of habeas petitioners was expressed by Judge Duniway, concurring in *Weller v. Dickson*, 314 F.2d 598, 602 (9th Cir.), cert. denied, 372 U.S. 845 (1963), where he observed:

---

<sup>3</sup>Such license does not exist in federal criminal trials, and this Court has refused to permit a criminal defendant to engage in a "broad or blind fishing expedition . . . on the chance that something . . . might turn up." *Gordon v. United States*, 344 U.S. 414, 419 (1953); accord, *Jencks v. United States*, 353 U.S. 657, 666-67 (1957). Even California, with its extremely liberal approach to permitting discovery by a criminal defendant, has refused to allow depositions or interrogatories for discovery purposes. *Clark v. Superior Court*, 190 Cal.App.2d 739, 12 Cal.Rptr. 191 (1961); *People v. Lindsay*, 227 Cal.App.2d 482, 510-11, 38 Cal.Rptr. 755 (1964), limited on unrelated issue, *People v. Haston*, 69 A.C. 237, n. 22 at 255, 444 P.2d 91, n. 22 at 102-03, 70 Cal.Rptr. 419, n. 22 at 430-31 (1968).

"We know from sad experience with habeas corpus and 2255 cases that imprisoned felons are seldom, if ever, deterred by the penalties of perjury. They do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court."

If petitioners could utilize discovery techniques to learn the information still available to the state concerning their case, it would undermine the reliability of the fact-finding process. An experienced petitioner would be enabled to tailor the allegations of his traverse and to testify at an evidentiary hearing so as to avoid contradictions otherwise impeaching or rebutting his claims. Discovery would thus open new avenues for abuse since a crafty petitioner could perjure himself with virtual impunity.<sup>4</sup> As Judge Murphy remarked in *Sullivan v. United States*, 198 F. Supp. 624, 626 (S.D.N.Y. 1961), "[T]he remedy has been subject to flagrant abuse, . . . and to our

---

<sup>4</sup>The problems and abuses multiplied by opening this Pandora's box do not end with fabrication and falsification. A vindictive petitioner would no doubt revel in this additional opportunity to harass and annoy whomsoever he might choose among those law enforcement officials, officers of the court, and judges who are directly or even remotely connected with the facts and circumstances culminating in his imprisonment. This malicious tendency among prisoners has often been noted in other areas. See, e.g., *Carey v. Settle*, 351 F.2d 483, 484 (8th Cir. 1965); *Allison v. Wilson*, 277 F.Supp. 271, 272 (N.D. Cal. 1967); *Urbano v. Sondern*, 41 F.R.D. 355, 358 (D. Conn.), aff'd, 370 F.2d 13 (2d Cir. 1966). Some prisoners look upon their access to the courts as a cathartic or sublimit game. See *Allison v. Wilson*, *supra*; *Urbano v. Sondern*, *supra*. Furthermore, to extend discovery to habeas corpus cases requires the federal government to underwrite the costly deposition process—something which Congress has confined to evidentiary depositions. 28 U.S.C. § 2246 (1964). Lastly, discovery against prisoners raises serious problems in view of the right against self-incrimination.



minds, such abuse would be multiplied a hundredfold were the 'open sesame' civil discovery rules held applicable thereto."

This abuse factor is magnified—and the unsuitability of civil discovery techniques in habeas is demonstrated—when it is recalled that discovery may be initiated when suit is filed. Thus a petitioner could serve a number of deposition notices and interrogatories even before his petition has been examined by a federal judge and a decision made as to whether to issue an order to show cause. In an ordinary civil case, the use of discovery devices by attorneys is restrained by a desire to hold litigation costs down. Habeas petitioners would seldom be deterred by costs since they generally proceed *in forma pauperis* at government expense. The only way for the state to avoid having to respond to even the most patently frivolous or irrelevant discovery demand is by filing objections and appearing at the hearing thereon. The prospect of immersing the representatives of the state in a flood of absurd demands and bogging down the courts with hearings on objections thereto would no doubt appeal to many prisoners. *Cf. Weller v. Dickson*, 314 F.2d 598, 601-02 (9th Cir. 1963) (concurring opinion). The burden upon the federal judiciary and state attorneys would be intolerable.

The admonition in section 2243 to "summarily hear and determine the facts" itself persuasively contravenes petitioner's assertion that civil discovery procedures should be available in habeas proceedings. Any practitioner with experience in civil litigation must rec-

ognize that discovery results in delay. It often becomes a Fabian tactic utilized to harass the opponent and postpone trial. The delay inherent in the discovery process is inconsistent with the summary determination of a habeas petition envisioned in section 2243.

Finally, it is incongruous to give state prison inmates who submit federal habeas petitions civil discovery devices which are not available to presumptively innocent defendants in criminal prosecutions in federal or state courts. As Judge Merrill noted in *Wilson v. Weigel*, 387 F.2d 632, 634 (9th Cir. 1967):

"To deny ~~criminal~~ discovery at the time of trial only to grant it in post-conviction proceedings seems to us to make little sense. . . . Such a holding could completely destroy finality of state court criminal judgments and render state proceedings mere preliminaries to the unlimited factual exploration available for the first time in federal habeas corpus." (Footnote omitted.)

**E. Whether discovery should be extended to habeas proceedings should be left to Congress.**

To some, discovery in habeas corpus might seem both reasonable and advantageous, but to others it appears wholly unsuitable. Discovery is a matter which requires the "mature consideration of informed opinion from all relevant quarters. . . ." *Miner v. Atlass*, 363 U.S. 641, 650 (1960). In view of the comprehensive statutory scheme, the clear limitations upon interrogatories and depositions set out in the Habeas Act, and the drastic change this innovation would work upon habeas procedure, the following

observation from *Holiday v. Johnston*, 313 U.S. 342, 352 (1941), wherein this Court found Rule 53 inapplicable to habeas corpus, is particularly appropriate:

“It may be that the practice is a convenient one, but, if so, that consideration is for Congress. In view of the plain terms in which the Congressional policy is evidenced in the Habeas Corpus Act, the courts may not substitute another more convenient mode of trial.”

### III

#### THE DISTRICT COURT DID NOT HAVE “INHERENT POWER” TO AUTHORIZE DISCOVERY INTERROGATORIES IN A HABEAS CORPUS PROCEEDING.

Petitioner asserts that a district court has the “inherent power” to order discovery through interrogatories in a habeas corpus proceeding (Petitioner’s Brief, pp. 6, 12-18). As authority for this postulation, he relies upon three decisions which purport to invoke the “inherent power” of the court to grant limited discovery in criminal cases,<sup>5</sup> a decision which presupposes the existence of “inherent power,”<sup>6</sup> two

<sup>5</sup>*United States v. Nolte*, 39 F.R.D. 359 (N.D. Cal. 1965) (opinion of petitioner herein); *United States v. Williams*, 37 F.R.D. 24 (S.D.N.Y. 1965); *United States v. Taylor*, 25 F.R.D. 225, 228 (E.D.N.Y. 1960). None of these cases purported to extend general discovery to defendants—something which this Court has also refused to do. See note 3; *supra*. The 1966 amendment to Federal Rule of Criminal Procedure 16 has extended the scope of discovery, but has not authorized an unlimited discovery.

<sup>6</sup>*Shores v. United States*, 174 F.2d 838, 845 (8th Cir. 1940). The discussion was limited to the court’s control over the defendant’s confession, which “would seem to be different inherently than as to the ordinary elements of the Government’s case.” *Ibid*.

decisions which mentioned "inherent power" in passing,<sup>7</sup> and a section 2255 case where "inherent power" was utilized to provide the petitioner with certain medical records.<sup>8</sup> Assuming that petitioner can now urge "inherent power" as a basis for reversal, it is clear that a district court does not have the "inherent power" to order discovery in habeas corpus proceedings.

Well over a century ago, in *Cary v. Curtis*, 44 U.S. (3 How.) 235, 244-45 (1845), this Court observed that the inferior courts of the United States are creatures of statute, that they are limited in authority, and that they have no inherent powers:

"[T]he judicial power of the United States although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

---

<sup>7</sup>*United States v. Murray*, 297 F.2d 812, n. 7 at 821-22 (2d Cir.), cert. denied, 369 U.S. 828 (1962); *United States v. Rothman*, 179 F.Supp. 935, 938 (W.D. Penn. 1959).

<sup>8</sup>*Sullivan v. United States*, 198 F.Supp. 624, n. 2 at 626 (S.D. N.Y. 1961). No issue was raised as to such a power since the United States consented to production of the records. It is also important to note that the district judge in *Sullivan* specifically held that civil discovery rules did not apply to proceedings in the nature of habeas corpus. *Id.* at 626.

To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows then, that the courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. *The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription, or by the common law.*" (Emphasis added.)

In *Miner v. Atlass*, 363 U.S. 641 (1960), a contention almost identical to that of petitioner herein was rejected by this Court. Relying upon *Cary v. Curtis*, *supra*, it was held that a court of admiralty did not have inherent power, independent of any statute or rule, to order the taking of depositions for the purpose of discovery. *Id.* at 643-44.

In *Miner*, it was also claimed that the district court could formulate a rule permitting discovery depositions.



tions under Rule 44 of the General Admiralty Rules (similiar to Rule 83 of the Federal Rules of Civil Procedure).<sup>9</sup> But this Court stated:

"As we have noted, the determination of this Court in 1939 to promulgate some but not all of the Civil Rules relating to discovery must be taken as an advertent declination of the opportunity to institute the discovery-deposition procedure of Civil Rule 26(a) throughout courts of admiralty. . . .

" . . . .  
 "We deal here only with the procedure before us and our decision is based on its particular nature and history. Discovery by deposition is at once more weighty and more complex a matter than either of the examples just discussed or others that might come to mind. Its introduction into federal procedure was one of the major achievements of the Civil Rules, and has been described by this Court as 'one of the most significant innovations' of the rules. *Hickman v. Taylor*, 329 U.S. 495, 500. Moreover, the choice of procedures adopted to govern various specific problems arising under the system was in some instances hardly less significant than the initial decision to have such a system. It should be obvious that we are not here dealing either with a bare choice between an affirmative or a negative answer to a narrow question, or even less with

---

<sup>9</sup>The ruling of the District Court herein was on even more tenuous ground than that of the court in *Miner*. In *Miner*, the discovery procedure had been permitted by the district courts as a unit ("majority of the judges") as required by Admiralty Rule 44. In the present case, no effort to comply with Rule 83 was made for the discovery procedure emanated from a single judge acting alone.

the necessary choice of a rule to deal with a problem which must have an answer, but need not have any particular one. Rather, the matter is one which, though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine, and which arises in a field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed.

"The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, see 28 U.S.C. § 331 (advisory function of Judicial Conference), 28 U.S.C. § 2073 (Prior report of proposed rule to Congress '[in admiralty cases]'), designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords. Having already concluded that the discovery-deposition procedure is not authorized by the General Admiralty Rules themselves, we should hesitate to construe General Rule 44 as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress as would now be required under 28 U.S.C. § 2073." *Miner v. Atlass, supra*, 363 U.S. at 648-50 (footnotes omitted).

This cogent reasoning applies with equal force to the present case and compels the conclusion that no district court can provide procedures in habeas corpus cases by a mystical incantation of "inherent powers."

Petitioner attempts to distinguish *Miner* by citing several cases for the proposition that district courts have traditionally permitted discovery in habeas corpus (Petitioner's Brief, p. 16). But none of those cases relied upon a "traditional discovery practice" in habeas proceedings and all were decided long after the Civil Rules had been adopted. *Sullivan v. Dickson*, 283 F.2d 725, 727 (9th Cir. 1960), cert. denied, 366 U.S. 951 (1961), and *Smith v. United States*, 174 F. Supp. 828, 830, 835 (S.D.Cal. 1959), appeal dismissed as untimely, 272 F.2d 228 (9th Cir. 1959), cert. denied, 362 U.S. 954 (1960), assumed that the Federal Rules of Civil Procedure applied to habeas corpus. *Schiebelhut v. United States*, 318 F.2d 785, 786 (6th Cir. 1963), and *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 61-64 (5th Cir. 1962), cert. denied, 372 U.S. 915 (1963), concluded that the Civil Rules applied because habeas is a "civil" proceeding. As demonstrated in Argument V, *infra*, at pp. 69-73, these cases were erroneous. *Knowles v. Gladden*, 254 F.Supp. 643, 644-45 (D.Ore. 1965), relied upon title 28, United States Code, section 2246, and the Civil Rules. The *Knowles* decision is clearly in error. See Argument II, *supra*, pp. 19-22. *Harris v. North Carolina*, 240 F.Supp. 985, 989-90 (E.D.N.C. 1965), adopted a practice explicitly sanctioned by title 28, United States Code, section 2246.<sup>10</sup> As a matter of fact, not a single authority

<sup>10</sup>A careful reading of the case indicates that the interrogatories were used as provided in section 2246 to test evidence submitted in affidavit form:

"[R]espondent has had the opportunity to cross-examine the affiant by means of interrogatories, counter-affidavit or deposition. Respondent chose the method of interrogatories as the method best able to serve its purpose." *Id.* at 990.

suggests that discovery has been a practice traditionally utilized in habeas corpus proceedings. See Argument V, *infra*, at pp. 61-62, 65-66.

Of course, a district court does have the power, implicit in its office, to regulate matters of internal administrative procedure, decorum, and courtroom order. *Tribune Review Publishing Co. v. Thomas*, 120 F. Supp. 362, 371 (W.D. Penn. 1954); see *Sheppard v. Maxwell*, 384 U.S. 333, 357-63 (1966); *Estes v. Texas*, 381 U.S. 532, 548, 562 (1965) (majority opinion and opinion of Warren, C.J., concurring). But discovery is a "significant innovation" which has "as great importance . . . as many a 'substantive' doctrine . . . ." *Miner v. Atlass*, *supra*, 363 U.S. at 649-50. It is hardly a matter of internal administrative procedure, decorum, or maintenance of order.

In authorizing the Supreme Court to formulate the Federal Rules of Civil Procedure, including the discovery provisions of Rules 26 to 37, it was the understanding of Congress that this was a delegation of the power held by Congress to limit the jurisdiction of the federal courts. This is made clear by the report of Representative Sumners in presenting the Federal Rules to the House:

"It should be emphasized that any and all of the rules of procedure are subject to modification or repeal by Congress. Furthermore, it is the opinion of the Committee that amendments made by the Supreme Court to the united rules must be submitted to Congress in accordance with the method prescribed for submitting the original rules, i.e., they must be submitted to Congress by

the Attorney General at the beginning of a regular session and will not go into effect until after the close of that session." H.R. REP., No. 2743, 75th Cong., 3d Sess. 3-4 (1938).

The requirement of submitting proposed rule changes to Congress has also been codified. 28 U.S.C. § 2072 (1964). In every other case in which discovery practice has been instituted, this procedure has been followed. Thus when the scope of discovery in federal criminal cases was enlarged, it was done through the rule-making process. FED. R. CRIM. P. 16 (amended 1966). And when discovery was extended to proceedings in admiralty, it was accomplished by a change in the rules. FED. R. CIV. P. 1, 81(a)(1) (amended 1966). It is unthinkable that such a radical change in habeas corpus proceedings could be effected without congressional approval. See *Miner v. Atlass*, 363 U.S. 641, 650-51 (1960); cf. *Fay v. Noia*, 372 U.S. 391, 435 (1963); *Brown v. Allen*, 344 U.S. 443, 450 (1953). Obviously, this prerequisite is not met by a district court which creates rules *ex arbitrio judicis*.

An assertion of "inherent power" is particularly weak in the area of habeas corpus proceedings. Habeas jurisdiction arises under and procedure is defined in the Habeas Corpus Act. 28 U.S.C. §§ 2241-54 (1964); *Brown v. Allen*, 344 U.S. 443, 460-61 (1953); *Holiday v. Johnston*, 313 U.S. 342, 350-52 (1941); *Walker v. Johnston*, 312 U.S. 275, 283-85 (1941).

"[T]he courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be



invested by it . . . ." *Cary v. Curtis*, 44 U.S. (3 How.) 235, 244-45 (1845).

The use of depositions has been authorized only for evidential purposes, and interrogatories are permitted only to provide a means akin to cross-examination for testing the credibility of an affiant. 28 U.S.C. § 2246 (1964) (see Argument II, *supra* at pp. 19-22). Hence the utilization of these techniques for discovery is clearly going beyond the statute and asserting an authority not granted thereby.

#### IV

**THE "ALL WRITS" STATUTE DOES NOT PROVIDE A DISTRICT COURT WITH A BASIS FOR AUTHORIZING DISCOVERY INTERROGATORIES IN A HABEAS CORPUS PROCEEDING.**

Relying upon title 28, United States Code, section 1651(a), petitioner asserts that discovery by interrogatories is authorized in habeas corpus, either as a writ of mandamus, a subpoena *ad testificandum*, or a subpoena *duces tecum* (Petitioner's Brief, pp. 6-7, 18-22). Assuming, *arguendo*, that petitioner may raise this issue for the first time in his brief,<sup>11</sup> his thesis is patently specious.

Petitioner commences this argument by characterizing the discovery order herein as the equivalent of a writ of mandamus, which writ may be issued under

<sup>11</sup>Petitioner's third argument makes its debut in his opening brief. Section 1651(a) was not urged as the basis for discovery in the District Court, nor was it cited in the Court of Appeals. It was not even mentioned in his petition for certiorari.

section 1651(a). A writ of mandamus may be directed to any person, corporation, or inferior court. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 168 (1803); 3 W. BLACKSTONE, COMMENTARIES 110 (1768); see *Stern v. South Chester Tube Co.*, 390 U.S. 606, 608-09 (1968). But "it will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined." *United States v. Wilbur*, 283 U.S. 414, 420 (1931). A "ministerial" duty is an act to the performance of which the applicant is entitled as of right; the obligation to perform being a function of some public or private office. *Marbury v. Madison*, *supra*, 5 U.S. (1 Cranch) at 168; 3 W. BLACKSTONE, COMMENTARIES 110 (1768); cf. *Stern v. South Chester Tube Co.*, *supra*, 390 U.S. at 608-10. "The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable." *United States v. Wilbur*, *supra*, 283 U.S. at 420.

There is clearly no law requiring either public or private persons to furnish a petitioner in habeas corpus with information which may lead to the discovery of some defect in the proceedings through which he was committed. Nor can a writ of mandamus create such a duty. "The duty to be enforced by mandamus must not only be merely ministerial, but it must be a duty which exists at the time when the application for the mandamus is made." *United States ex. rel. International Contracting Co. v. Lamont*, 155 U.S. 303, 308 (1894). "The object of the writ is to enforce the performance of an existing duty, not to create a new one." *Ex parte Rowland*, 104 U.S. 604,

612 (1881); accord, *ibid.*; *Brunswick v. Elliott*, 103 F.2d 746, 750 (D.C. Cir. 1939).

Alternatively, petitioner classifies the discovery order as a subpoena *ad testificandum* or *duces tecum*. But the similarity is neither apparent nor real.

"[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1964).

"In determining what auxiliary writs are 'agreeable to the usages and principles of law,' we look first to the common law." *United States v. Hayman*, 342 U.S. 205, n. 35 at 221 (1952).

"With regard to *parol* evidence, or *witnesses*; it must be first remembered that there is a process to bring them in by writ of subpoena *ad testificandum* (a subpoena to give evidence); which commands them, laying aside all pretenses and excuses, to appear at the trial . . . ." 3 W. BLACKSTONE, COMMENTARIES 369 (1768).

The function of this form of subpoena is to secure the presence of a witness at trial for the purpose of giving evidence. See *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 618 (1929); *Blair v. United States*, 250 U.S. 273, 280-81 (1919). Thus a subpoena *ad testificandum* which is "agreeable to the usages and principles of law" cannot be used for discovery because the presence of the witness would not be sought for the purpose of giving evidence at trial. Nor can discovery be achieved through a subpoena

*duces tecum*. A subpoena *duces tecum* is confined to the production of papers, books, and other writings. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951);<sup>12</sup> *In re Shephard*, 3 F. 12, 13 (E.D.N.Y. 1880). But a subpoena *duces tecum* cannot be used for the purpose of discovery. *Cf. Bowman Dairy Co. v. United States*, *supra*, 341 U.S. at 220; *United States v. Carter*, 15 F.R.D. 367, 369 (D.D.C. 1954) (opinion of Holtzoff, D.J.). Discovery is impossible under such a subpoena because the documents need not be produced until the time of trial. Statement of G. Youngquist (Member of Advisory Committee on Federal Rules of Criminal Procedure), PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES OF CRIMINAL PROCEDURE 167-68 (N.Y.U. School of Law, Institute Proceedings, Vol. VI, Holtzoff ed., 1946), quoted in *Bowman Dairy Co. v. United States*, *supra*, 341 U.S., n. 5 at 220; see *United States v. Ferguson*, 37 F.R.D. 6, 7 (D.D.C. 1965) (opinion of Holtzoff, D.J.); *United States v. Carter*, *supra*, 15 F.R.D. at 369; *United States v. Maryland & Va. Milk Producers Ass'n*, 9 F.R.D. 509, 510 (D.D.C. 1949) (opinion of Holtzoff, D.J.), cited in *Bowman Dairy Co. v. United States*, *supra*, 341 U.S. at 220.<sup>13</sup> Hence a subpoena *duces tecum* cannot

<sup>12</sup>In *Bowman Dairy*, *supra*, it was noted that Criminal "Rule 17 provided for the usual subpoena *ad testificandum*, and *duces tecum* . . ." Federal Rule of Criminal Procedure 17(c) provides process for the production of "books, papers, documents or other objects designated therein."

<sup>13</sup>In *United States v. Carter*, *supra*, Judge Holtzoff discussed what this Court in *Bowman Dairy*, *supra*, called the "chief innovation" of Criminal Rule 17:

"Rule 17(c) deals with subpoenas *duces tecum* and is for the most part a restatement of preexisting law. It makes an addition, however, to the effect that the court may direct

be used for discovery herein since it requires the production of existing written evidence rather than oral evidence or writings prepared in response to interrogatories, and also because it is not returnable until the time of trial. As Judge Benedict aptly observed in *In re Shephard, supra*, 3 F. at 13: "The writ now under consideration seems, therefore, to be a novelty, not agreeable to any usage of the law, and therefore not within the power conferred by the statute."<sup>14</sup>

---

that a subpoena *duces tecum* be returnable prior to the trial, and may permit the documents and objects that have been subpoenaed to be inspected on the return day. The purpose of this Rule was not to grant additional discovery, but merely to facilitate and expedite trials, in order that a trial may not be delayed while counsel are examining voluminous documents produced in response to subpoena. It was contemplated that a Rule such as this would be particularly helpful in protracted trials in which there is mass of documentary evidence, such as antitrust cases, mail fraud cases, and other similar proceedings."

This new "pre-trial" subpoena *duces tecum* does not apply to habeas corpus cases since the Criminal Rules are inapplicable thereto. FED. R. CRIM. P. 54, n. 5 to subdivision (b)(4).

<sup>14</sup>For the contrary proposition, petitioner cites: *Olson Rug Co. v. NLRB*, 291 F.2d 655, 659 (7th Cir. 1961); *Bethlehem Shipbuilding Corp. v. NLRB*, 120 F.2d 126, 127 (1st Cir. 1941); *Kamey Soap Prods. Co. v. United States*, 110 F.Supp. 430, 439 (Ct. Cl. 1953). *Kamen* declares that section 1651(a) is authority for the issuance of a subpoena *duces tecum* returnable before a commissioner appointed to take evidence, but it does not hold that a subpoena *duces tecum* may be used for discovery. *Kamen Soap Prods. Co. v. United States, supra*, 110 F.Supp. at 435-39. Though *Bethlehem* did reach that result, no authority was cited for such a proposition. As respondent demonstrates in this argument, there is none. *Olson* relied upon *Bethlehem* and suffers from its fundamental defect.

In addition, however, it should be noted that *Olson* and *Bethlehem* were contempt actions arising out of National Labor Relations Board orders. Enforcement proceedings in the district courts are governed by the Civil Rules. FED. R. Civ. P. 81(a)(5). As the court in *Bethlehem* observed, the discovery rules would seem to apply to the court of appeals by analogy since it, rather than the district court, was the trier of fact. *Bethlehem Ship-*



That petitioner's arguments that these three writs afford a basis for the District Court's discovery order is but an aberrant novelty does not turn solely upon a logical analysis of their functions and limitations. The "all writs" statute has been continuously in force since the Judiciary Act of 1789.<sup>15</sup> See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272-73 (1942). But until the advent of the Federal Rules of Civil Procedure, there was no provision for discovery under federal law, with the exception of Equity Rule 58. 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 641 at 11 (Wright rev. 1941); see *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947).<sup>16</sup> Had mandamus, subpoenas *ad testificandum*, and subpoenas *duces tecum* been available as discovery tools, this would not have been the case

---

*building Corp. v. NLRB*, *supra*, 120 F.2d at 126. In the sense that the subpoena powers in district court proceedings to enforce National Labor Relations Board orders have been "enlarged" by the discovery provisions of the Civil Rules, the expansion has not extended to subpoenas issued in habeas corpus cases. See text accompanying note 18, *infra*, at p. 45, and following note 19, *infra*, at pp. 46-47. Unlike contempt actions, habeas corpus proceedings have always been considered regulated by statute. See text preceding note 19, *infra*, at p. 46. The limited use of depositions and interrogatories in habeas corpus cases, 28 U.S.C. § 2246 (1964), would seem to preclude accomplishing, by some devious route, something which is forbidden by statute. See pp. 45-47, *infra*.

<sup>15</sup>Ch. 20, § 14, 1 Stat. '81.

<sup>16</sup>Accidental discovery was also possible under a statute permitting depositions *de bene esse*, a statute authorizing depositions under *dedimus potestatem* or *in perpetuum*, and Equity Rule 47 which allowed pre-trial depositions of witnesses in exceptional cases. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 19 (1938), quoted in 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 641, n. 10 at 12 (Wright rev. 1961). The scope of these provisions is discussed in Argument V, *infra*, at pp. 62-68.

and there would have been no necessity for the discovery provisions of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or the 1966 amendments to the Civil Rules to permit discovery in admiralty.<sup>17</sup> Since Equity Rule 58 was the only discovery provision in federal law, the use of mandamus or subpoenas for that purpose is not "agreeable to the usages and principles of law."

Petitioner nevertheless points to *Price v. Johnston*, 334 U.S. 266, 282 (1948), as authority for the proposition that the scope of writs under section 1651(a) is constantly expanding to achieve the "rational ends of law."<sup>18</sup> But that statute does not permit unlimited expansion or mutation of traditional forms. It is not a blank check which may be filled in without regard

<sup>17</sup>FED. R. CIV. P. 1, 81(a)(1). In Rule 1, "or in admiralty" was added after "cognizable as cases at law or in equity." The first sentence of Rule 81(a)(1) in its original form read: "These rules do not apply to proceedings in admiralty." This was changed to: "These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C. §§ 7651-81."

<sup>18</sup>The passage quoted is as follows:

"[W]e do not conceive that a circuit court of appeals, in issuing a writ of *habeas corpus* under § 262 of the Judicial Code, is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. Section 262 says that the writ must be agreeable to the usages and principles of 'law,' a term which is unlimited by the common law or the English law. And since 'law' is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the *habeas corpus* writ authorized by § 262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. In short, we do not read § 262 as an ossification of the practice and procedure of more than a century and a half ago. Rather it is a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.' *Adams v. United States ex rel. McCann*, *supra*, 273."

to statutory procedures or rules adopted under congressional sanction. Any use of the judicial writ power is confined within the framework established by Congress to regulate the proceeding in which that power is exercised. See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942). Where the statutes establish procedures or limit their application, a court cannot issue a writ whose only effect would be to avoid those conditions and thwart the congressional policy. Cf. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943). This restriction upon the writ power is similar to the congressional limitation of jurisdiction, of which this Court has said: "To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely." *Cary v. Curtis*, 44 U.S. (3 How.) 235, 244 (1845).

It has been repeatedly acknowledged that proceedings in federal habeas corpus are confined within the framework of the statutory scheme. *Brown v. Allen*, 344 U.S. 443, 460-61 (1953); *Holiday v. Johnston*, 313 U.S. 342, 350-51 (1941); *Walker v. Johnston*, 312 U.S. 275, 283-84 (1941). Though depositions and interrogatories are permitted in habeas proceedings, they are authorized only for the production of evidence and not to accomplish discovery. 28 U.S.C. § 2246 (1964); see Argument II, *supra*, at pp. 19-22.<sup>19</sup> Insofar as the subpoena power now permits discovery,

<sup>19</sup>"When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

this expansion has been made only through the adoption of rules of procedure. FED. R. CIV. P. 45, implementing FED. R. CIV. P. 26-37; FED. R. CRIM. P. 17. These rules do not apply to habeas corpus proceedings. FED. R. CIV. P. 81(a)(2); FED. R. CRIM. P. 54, n. 5 to subdivision (b)(4). Consequently, the subpoena powers in habeas corpus cases have not been enlarged. To hold otherwise would be to thwart the congressional policy found in the exclusionary provisions of Civil Rule 81(a)(2) and Criminal Rule 54. *Cf. Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943).

Nor does the passage from *Price v. Johnston*, 334 U.S. 266, 282 (1948), seem applicable to the discovery area, for section 1651(a) was therein described as a "source of procedural instruments." But discovery is not merely a "procedural" matter, for it is a significant innovation in judicial proceedings which is tantamount to a substantive doctrine. *Miner v. Atlass*, 363 U.S. 641, 649-50 (1960).

"The problem then is one which peculiarly calls for the exacting observance of the statutory procedures surrounding the rule-making powers of the Court . . . designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Id.* at 650.

## V

**THE DISCOVERY PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT APPLY TO HABEAS CORPUS PROCEEDINGS.**

Lastly, petitioner argues that the discovery provisions of the Federal Rules of Civil Procedure extend to habeas corpus cases (Petitioner's Brief, p. 7, 23-25).<sup>20</sup> The Federal Rules themselves define their limits and indicate that the discovery provisions are not appropriate to habeas corpus proceedings. Rule 1, entitled "Scope of Rules," states that:

"These rules govern the procedures in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, *with the exceptions stated in Rule 81.*" (Emphasis added.)

Rule 81(a)(2) declares that:

"These rules are applicable to . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions."<sup>21</sup>

<sup>20</sup>This is the only one of petitioner's four present claims which was raised in the Court of Appeals.

<sup>21</sup>As originally promulgated, the rule read:

"In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: . . . habeas corpus. . . ."

After separate appellate rules were promulgated in 1968, the phraseology was changed to "eliminate inappropriate references to appellate procedure." Fed. R. Civ. P. 81(a), n. to 1968 amendment.



The clarity of this exclusionary provision has been obscured by the passage of time. As a consequence, courts which have considered the applicability of various of the Civil Rules to habeas corpus proceedings have reached diverse conclusions. Some discuss specific rules in the factual context in which they arise, seemingly assuming their applicability without making an initial determination.<sup>22</sup> Some state that the Rules apply because habeas corpus is a civil proceeding.<sup>23</sup> One concluded that a rule had to apply

<sup>22</sup>*Fortner v. Balkcom*, 380 F.2d 816, 818, 820-21 (5th Cir. 1967) (Rules 5(b) [service on attorney], 31 [deposition on interrogatories], 52(a) [findings of fact]); *Molignaro v. Dutton*, 373 F.2d 729, 730 (5th Cir. 1967) (Rule 31 [deposition on interrogatories]); *Rogers v. Bennett*, 320 F.2d 83, 86 (8th Cir. 1963) (dictum) (discovery procedures); *Sullivan v. Dickson*, 283 F.2d 725, 727 (9th Cir. 1961) (Rules 27(c) [perpetuation of testimony], 30 [depositions on oral examination], 34 [production of documents], 45(b) [subpoena *duces tecum*]), cert. denied, 366 U.S. 951 (1961); *Chessman v. Teets*, 239 F.2d 205, nn. 7 & 8 at 211 (9th Cir. 1956) (Rules 26 [depositions pending action], 45 (e) (1) [subpoena of witness]), rev'd on other grounds, 354 U.S. 156 (1957); *Hammerer v. Huff*, 110 F.2d 113, 115 (D.C. Cir. 1939) (Rule 8(d) [failure to deny]); *Bowen v. Boles*, 258 F. Supp. 111, 113 (N.D. W.Va. 1966) (Rule 6(b) (2) [enlargement of time]); *United States ex rel. Bruno v. Herold*, 39 F.R.D. 570, 572 (N.D.N.Y.) (Rule 60(b) (6) [relief from judgment]), rev'd on other grounds, 368 F.2d 187 (2d Cir. 1966); *Smith v. United States*, 174 F.Supp. 828, 830, 835 (S.D. Cal. 1959) (Rules 17(c) [guardian ad litem], 35 [mental examination]), appeal dismissed as untimely, 272 F.2d 228 (9th Cir. 1959), cert. denied, 362 U.S. 954 (1960); *Hamilton v. Hunter*, 65 F.Supp. 319, 320 (D. Kan. 1946) (Rule 15(b) [amendment by implied consent]).

<sup>23</sup>*Schiebelhut v. United States*, 318 F.2d 785, 786 (6th Cir. 1963) (Rules 33 [interrogatories to parties], 37(d) [failure to serve answers]); *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 61-64 (5th Cir. 1962) (Rule 36(a) [request for admissions]), cert. denied, 372 U.S. 915 (1963); *Bowdidge v. Lehman*, 252 F.2d 366, 368 (6th Cir. 1958) (Rules 56 [summary judgment], 57 [declaratory judgment]); *Estep v. United States*, 251 F.2d 579, 581-83 (5th Cir. 1958) (Rules 41(a) (1) [voluntary dismissal], 45 [subpoena]); *Lyles v. Beto*, 32 F.R.D. 248 (S.D. Tex. 1963) (Rule 45(e) (1) [subpoena]).

because other courts had applied other rules.<sup>24</sup> Two cases relied not only upon other "civil-case-means-civil-rules" decisions, but also held that application of the rules was necessary to effectuate a statutory policy.<sup>25</sup> In another decision, the judge declared that he had "inherent power" to order proceedings conducted in a manner similar to the civil rules.<sup>26</sup> One court refused to apply Rule 35, noting that the rules apply only to civil cases.<sup>27</sup> Another found that Rule 81(a)(2) precluded application of Rule 52.<sup>28</sup> Two courts have held the civil rules inapplicable to habeas corpus,<sup>29</sup> and three others consider them appropriate only by way of analogy.<sup>30</sup> This Court has held Rule

<sup>24</sup>*Abel v. Tinsley*, 338 F.2d 514, 515-16 (10th Cir. 1964) (Rule 60(b) [relief from default]).

<sup>25</sup>*Knowles v. Gladden*, 254 F.Supp. 643, 644-45 (D.Ore. 1965) (Rules 26 [depositions pending action] and 30 [depositions on oral examination] to implement section 2246); *In re McShane*, 235 F.Supp. 262, 266 (N.D.Miss. 1964) (Rule 56 [summary judgment] to effect section 2243).

*McGarrah v. Dutton*, 381 F.2d 161, 163 (5th Cir. 1967) (Rule 26(d)(3), (4) [deposition of deceased witness]), probably fits into this category. The responses to interrogatories prepared and used in a state habeas proceeding were admitted into evidence under the authority of the Federal Rules and sections 2246-47. Section 2247 appears to permit the use of such evidence.

<sup>26</sup>*Hardison v. Dunbar*, 256 F.Supp. 412, 414 (N.D.Cal. 1966) (similar to Rule 59(b) [motion for new trial]).

<sup>27</sup>*United States v. Burdette*, 161 F.Supp. 326, 331 (E.D. Mich. 1957) (Rule 35 [mental examination]), *aff'd*, 254 F.2d 610 (6th Cir. 1958), *cert. denied*, 359 U.S. 976 (1959).

<sup>28</sup>*United States ex rel. McCann v. Adams*, 3 F.R.D. 396, 404 (S.D. N.Y. 1944) (Rule 52 [findings of fact]).

<sup>29</sup>*Albert ex rel. Buice v. Patterson*, 155 F.2d 429, 433 (1st Cir.), *cert. denied*, 329 U.S. 739 (1946); *Burleson v. United States*, 205 F.Supp. 331, 334 (W.D.Mo. 1962).

<sup>30</sup>*Wilson v. Weigel*, 387 F.2d 632, n. 3 at 634 (9th Cir. 1967); *United States ex rel. Goldsby v. Harpole*, 249 F.2d 417, n. 3 at 420 (5th Cir. 1957), *cert. denied*, 361 U.S. 850 (1959); *United States ex rel. Jellic v. District Director of Immigration*, 106 F.2d 14, 20 (2d Cir. 1939).

53 inapplicable, and has pointed out that practice in habeas corpus is governed by statute. *Holiday v. Johnston*, 313 U.S. 342, 353 (1941). Three courts have also literally interpreted Rule 81(a)(2), thus testing the particular rule against prior practice to ascertain its applicability.<sup>31</sup> In view of these conflicting authorities, then, it is necessary to carefully examine Rule 81(a)(2) to determine the scope of its limitation.

Rule 81(a)(2) provides that the Civil Rules are applicable to habeas corpus "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." A literal reading compels an historical analysis of each procedural problem as it arises. See cases cited in note 31, *supra*. "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on 'superficial examination.' " *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943); cf. *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 444 (1955).

---

<sup>31</sup>These include: the decision below, *Wilson v. Harris*, 378 F.2d 141, 143-44 (9th Cir. 1967) (Rules 26 and 33 [interrogatories to parties] do not apply); *Hunter v. Thomas*, 173 F.2d 810, 812 (10th Cir. 1949) (Rule 59 [motions for new trial] applies); *Sullivan v. United States*, 198 F.Supp. 624, 625-27 (S.D. N.Y. 1961) (Rule 33 [interrogatories to parties] does not apply).

A. Analysis of the legislative history of the Rule 81(a)(2) exclusion compels the conclusion that the framers intended the Rules to have an exceedingly limited applicability to habeas corpus.

The genealogy of the Rule 81 exceptions discloses that the habeas corpus exclusion was neither casually inserted nor intended as part of a catchall section. The exceptions incorporated into the preliminary draft of the Federal Rules did not include a reference to habeas corpus. However, as Edward H. Hammond, a member of the legal staff of the Advisory Committee of Federal Rules, noted, the final draft specifically mentioned habeas corpus, evidently as a result of suggestions from the bench or bar. Hammond, *Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure*, 23 A.B.A.J. 629, 634 (1937); compare ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT 163, draft rule 90(a) (May 1936), with ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT 206, draft rule 83(a)(2) (April 1937).

It is clear that the framers of the Federal Rules, in making specific reference to habeas corpus in Rule 81, intended that the Federal Rules should have only limited applicability to habeas proceedings. Habeas corpus, though considered a "civil action," was nevertheless a "special proceeding" to which the normal rules for civil actions did not apply, except when a habeas corpus question was appealed. On March 4, 1938, Edgar B. Talman, the Secretary of the Advisory Committee on Rules for Civil Procedure, appeared before the Judiciary Committee of the House of Rep-



representatives. In explaining the proposed Federal Rules, which required congressional approval, Mr. Talman testified:

"Rule 81 is entitled 'Applicability in General.' The rules are intended to apply to all civil actions, but there are some special proceedings for which a special procedure has already been prescribed by Congress and to which they do not apply . . . . They apply to appeals with regard to . . . habeas corpus . . . ." *Hearings on H.R. 8892 Before the House Comm. on the Judiciary, 75th Cong., 3d Sess., ser. 17, at 130 (1938).*

That Rule 81 was meant to generally exclude habeas proceedings from the scope of the Federal Rules is also evidenced in statements made by William D. Mitchell, Chairman of the Advisory Committee, during his discussion of the rules at various symposiums conducted by the Institute on the Federal Rules of Civil Procedure held in 1938 under the auspices of the American Bar Association. Chairman Mitchell stated that "the rules . . . do not apply in . . . habeas corpus . . . that is all dealt with in Rule 81" ABA, PROCEEDINGS OF THE INSTITUTE ON THE FEDERAL RULES OF CIVIL PROCEDURE AT WASHINGTON, D.C., AND OF THE SYMPOSIUM AT NEW YORK CITY 187 (1938). "Nor do the rules apply to habeas corpus, . . . except as to appeals." *Id.* at 230. Rule 1, by its reference to Rule 81 demonstrates the limited applicability of the Federal Rules to habeas proceedings. This is made clear in this discussion by Chairman Mitchell:

"The only other matter I need speak of in Rule 1 is the reference to Rule 81. Rule 1 provides,



'these rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases in law or in equity, with the exceptions stated in Rule 81.' I will just skim over Rule 81 for a moment to give you the idea . . . . They [these rules] do apply to appeals, *but not otherwise*, in cases . . . [of] *habeas corpus* . . . ." *Id.* at 233 (emphasis added).

In *United States ex rel. Jelic v. District Director of Immigration*, 106 F.2d 14, 20 (2d Cir. 1939), Judge Charles E. Clark, Reporter to the Advisory Committee, similarly declared: "But the rules have only a limited application by way of analogy to habeas corpus proceedings, Rule 81(a)(2) . . . ."

The rationale behind the exclusion of habeas proceedings is not readily apparent, though the text of Rule 81 does suggest it. As originally promulgated, Rule 81 stated that the Federal Rules did not apply to habeas proceedings "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity." Texts and cases prior to the adoption of the Federal Rules are not particularly enlightening as to the procedure followed in habeas actions. However, the reasoning of the Advisory Committee is apparent in the testimony of its Secretary, Mr. Talman. In explaining to the House Judiciary Committee why, under Rule 81, the Federal Rules did not apply to habeas proceedings, Mr. Talman said, "[T]here are

some special proceedings for which a special procedure has already been prescribed by Congress and to which they do not apply." *Hearings on H.R. 8892 Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess., ser. 17, at 130 (1938) (emphasis added). Thus it is clear that the Federal Rules were not extended to habeas corpus because federal statutes already established what procedure was to be followed. This, then, explains the somewhat ambiguous note to Rule 81 which was appended by the Advisory Committee: "For example of statutes which are preserved by paragraph (2) see: . . . Title 28 . . . (Habeas corpus) . . ." *FED. R. CIV. P.* 81, n. to subdivision (a). Had habeas corpus not been generally excluded under Rule 81 (a)(2), all of the statutes establishing habeas procedure would have been repealed upon the adoption of the Civil Rules. 28 U.S.C. § 2072 (1964).

Discussions of the then-new Federal Rules by contemporary practitioners disclose a uniform interpretation of Rule 81 as excluding habeas corpus:

"In federal practice there are a number of cases of special nature which are not ordinary civil actions. Rule 81 makes specific mention of a good many special actions which are governed in whole or in part by special statutory provisions and to which these rules do not apply except to the extent stated in Rule 81. In connection with the application of the rules, it is, therefore, essential to look at Rule 81 so as to see where they do not apply." Edmunds, *New Federal Rules of Civil Procedure*, 4 JOHN MARSHALL L.Q. 291, 293 (1938-39).

"The exceptions mentioned in this rule [Rule 1] refer to certain proceedings named in Rule 81, such as bankruptcy, admiralty, citizenship, deportation and others [including habeas corpus], to which the new rules do not apply." Hopkinson, *The New Federal Rules of Civil Procedure compared with the Former Federal Equity Rules and the Wisconsin Code*, 23 MARQ. L. REV. 159, 161 (1938).

Mr. Hopkinson further noted that "in the following proceedings, these rules apply only to appeals: . . . habeas corpus . . ." *Id.* at 188 (interpreting Rule 81). The comprehensive statutory scheme was also held to be the exclusive procedure to be followed in *Holiday v. Johnston*, 313 U.S. 342 (1941). This Court noted that "the Acts of Congress . . . [regulate] the practice in habeas corpus cases." *Id.*, 313 U.S. at 349.

"Rule 81(a)(2) provides that appeals in habeas corpus cases are to be governed by the rules, but that the rules are not applicable 'otherwise than on appeal' in habeas corpus cases 'except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity \* \* \*.' . . . [T]he practice in habeas corpus is set forth in plain terms in the Revised Statutes . . ." *Id.*, 313 U.S. at 353.

Similarly, the Advisory Committee on the Federal Rules of Criminal Procedure observed that the Federal Rules of Civil Procedure do not apply to habeas corpus cases.

"As habeas corpus proceedings are regarded as civil proceedings, they are not governed by these

rules. The procedure in such cases is prescribed by 28 U.S.C. §§ 2241-2243, 2251-2253, formerly §§ 451-466. Appeals in habeas corpus proceedings are governed by the Federal Rules of Civil Procedure (Rule 81(a)(2) of the Federal Rules of Civil Procedure)." FED. R. CRIM. P. 54, n. 5 to subdivision (b)(5).

It should also be noted that title 28, United States Code, section 2242, provides that the application for a writ of habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." This provision would be unnecessary if the rules were generally applicable. *Cf. Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

Those who drafted the Federal Rules were of the opinion that they did not apply to habeas corpus cases.<sup>32</sup> Contemporary practitioners shared that belief. Those who drafted the Federal Rules of Criminal Procedure also considered the statutes the only source of habeas procedure. Even this Court has said that "the practice in habeas corpus is set forth in plain terms in the . . . statutes . . ." *Holiday v. Johnston*, 313 U.S. 342, 353 (1941). Thus, it is clear that the

---

<sup>32</sup>Petitioner suggests that these "informal" remarks are now considered inaccurate, citing: Note, *Civil Discovery in Habeas Corpus*, 67 COLUM. L. REV. 1296, n. 16 at 1298 (1967); Note, *Multiparty Federal Habeas Corpus*, 81 HARV. L. REV. 1482, n. 100 at 1495 (1968) (Petitioner's Brief, p. 27). However, it seems doubtful that students examining a complex system of rules 30 years after they were written know more about what those rules meant than the persons who drafted them.

Federal Rules of Civil Procedure have only limited applicability to proceedings in habeas corpus.<sup>33</sup>

<sup>33</sup>Petitioner responds as follows:

"The first time habeas corpus was mentioned in any draft was in a draft of February 20, 1937. It specified that except for appeals to which the rules would be applicable, habeas corpus would be governed exclusively by existing statutes. *Advisory Comm. on Rules for Civil Procedure, Preliminary Draft 3 as Revised*, draft Rule 90(a) (Feb. 20, 1937). Had such a provision been enacted it would have provided the blanket exclusion for which Respondent contends." (Petitioner's Brief, p. 27)

Respondent has been unable to establish the existence of "Preliminary Draft 3 as Revised" to which petitioner refers. There were only two "preliminary" drafts generally promulgated: ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT (May 1936); ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT (April 1937). See Hopkinson, *The New Federal Rules of Civil Procedure compared with the Former Equity Rules and the Wisconsin Code*, 33 MARQ. L. REV. 159 (1939); Pike, *The New Federal Rules of Civil Procedure*, 12 CALIF. STATE B.J. 192 (1937). These were the only drafts published. See SUPERINTENDENT OF DOCUMENTS, MONTHLY CATALOG OF UNITED STATES PUBLIC DOCUMENTS (1937); SUPERINTENDENT OF DOCUMENTS, MONTHLY CATALOG OF UNITED STATES PUBLIC DOCUMENTS (1936). Respondent was advised by Mr. Carl H. Imlay, General Counsel, Administrative Office of the United States Courts, that the two drafts noted above were the only ones of which he had a record. We suspect that petitioner obtained this citation from Note, *Multiparty Federal Habeas Corpus*, 81 HARV. L. REV. 1482 (1968), since the identical citation appears in footnote 98 on page 1495, and the text corresponding thereto is virtually identical. Respondent does not wish to impugn either the veracity of the Harvard Law Review or petitioner's motives. It may well be that the editors of that Note had access to a draft kept within the confines of the Committee. Nevertheless respondent feels obligated to note that he has been unable to examine this "authority" to which only the Harvard Law Review is privy.

Even if the draft were extant, it would not alter respondent's argument. We agree with petitioner insofar as he suggests that the Committee "could have" specifically restricted habeas corpus proceedings to the statutes. But that was not done. Respondent directs his argument at what was *meant*, regardless of the phraseology in Rule 81(a)(2) as promulgated.



B. Discovery under the Civil Rules does not apply to habeas corpus since neither criterion of Rule 81(a)(2) can be satisfied.

Under Rule 81(a)(2), the Civil Rules relating to discovery are applicable to habeas proceedings only if the practice in habeas (1) "is not set forth in statutes of the United States," and (2) "has heretofore conformed to the practice in civil actions." See *Wilson v. Harris*, 378 F.2d 141, 143-44 (9th Cir. 1967) (the case at issue herein); *Hunter v. Thomas*, 173 F.2d 810, 812 (10th Cir. 1949); *Sullivan v. United States*, 198 F.Supp. 624, 625-27 (S.D.N.Y. 1961). Under this test, it is clear that the discovery procedures of the Federal Rules do not apply in habeas corpus cases.

Petitioner cannot satisfy the first criterion simply by noting that discovery interrogatories are not expressly forbidden by the Habeas Corpus Act. Instead, the Act must be examined to determine whether it regulates the use of interrogatories. If the Act makes no provision for them, then the proper inquiry is whether such discovery is a concept alien to and incompatible with the statutory scheme. Cf. *Walker v. Johnston*, 312 U.S. 275, 285-86 (1941). But the second step cannot be reached, for the use of depositions and interrogatories in habeas is already regulated by statute and limited to evidentiary purposes. 28 U.S.C. § 2246 (1964); see Argument II, *supra*, at pp. 19-22. This restriction negatives the utilization of such techniques for discovery. See *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). Since section 2246 was enacted in 1948, almost ten years after adoption of the Federal Rules had authorized the use of

depositions and interrogatories as discovery tools, the section 2246 restriction indicates congressional rejection of discovery practices in the context of habeas corpus. See *Holiday v. Johnston*, 313 U.S. 342, 353 (1941). Furthermore, section 2242 requires the habeas petitioner to allege under oath the facts upon which he relies for relief. These allegations must establish a prima facie case before an order to show cause may be issued. *Brown v. Allen*, 344 U.S. 443, 502 (1953) (concurring opinion of Frankfurter, J., joined by majority of Court). As this Court observed in *Walker v. Johnston*, *supra* at 285, in interpreting the Habeas Corpus Act, "The question is what the statute requires." Section 2242 plainly requires the petitioner to know and allege the facts. This leaves no room for discovery.

To satisfy the second criterion, it is necessary to show that, prior to the adoption of the Federal Rules in 1938, interrogatories were used for discovery in civil actions<sup>34</sup> and that the practice in habeas corpus proceedings conformed thereto.<sup>35</sup> This requisite can-

---

<sup>34</sup>As originally promulgated, Rule 81(a)(2) required that the practice in habeas cases must conform to the prior practice in "actions at law or suits in equity." See note 21, *supra* at 48.

<sup>35</sup>Of this requirement, petitioner complains:

"[I]t would . . . confine modern habeas corpus to those [traditional] procedures alone. A procedural advance included in the Rules could not by definition conform to any procedure used in habeas corpus prior to enactment of the Rules. The effect of this reading of Rule 81(a)(2) would thus be to exclude such an advance automatically from use in habeas corpus proceedings. There is absolutely no evidence that the framers of Rule 81(a)(2) intended in this manner to freeze habeas proceedings in their pre-1938 form." (Petitioner's Brief, p. 30)

"[H]as heretofore conformed to the practice" certainly indicates that the drafters did not intend to work any change upon practice

not be met. Examination of all authorities on the subject has failed to disclose any American, English, or Canadian case prior to 1938 wherein discovery was allowed in a habeas corpus proceeding.<sup>36</sup> Not a single text on habeas corpus which we have examined suggests that discovery was part of the former federal habeas practice.<sup>37</sup> Conversely, none of the texts on discovery intimate that it could be had in habeas

---

in habeas corpus. In addition, Congress decreed that "such rules shall not abridge, enlarge or modify any substantive right. . . ." 28 U.S.C. § 2072 (1964). As this Court observed in *United States v. Sherwood*, 312 U.S. 584, 589-90 (1941):

"An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act . . . authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantial rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

Since this court has recognized the discovery practice as a substantial innovation tantamount to a substantive right, it cannot be extended to a class of actions to which the Rules did not apply. *Miner v. Atlass*, 363 U.S. 641, 648-50 (1960).

<sup>36</sup>Respondent has found only one habeas corpus case in which the subject is even broached. In *Re Smart Infants*, 12 Ont. Pr. R. 2 (1887), a father filed a petition for habeas corpus to recover the custody of his children who were with their mother. Discovery examination of each parent was ordered by consent:

"It was also agreed by counsel that in case I should direct that the evidence should be *viva voce*, the parties should submit to examination as in an ordinary action. Any order or direction that may issue will, if considered necessary, contain this term of it." *Id.* at 6 (emphasis added).

If anything, this case suggests that discovery is not applicable to habeas corpus cases.

<sup>37</sup>See 1 W. BAILEY, *HABEAS CORPUS AND SPECIAL REMEDIES* §§ 1-61 (1913); W. CHURCH, *HABEAS CORPUS* (2d ed. 1893); F. FERRIS & F. FERRIS, JR., *EXTRAORDINARY LEGAL REMEDIES* § 53 (1926); R. HURD, *HABEAS CORPUS* 289-319 (2d ed. 1876); D. PREM, *HABEAS CORPUS* 13-36 (1950); J. SCOTT & C. ROE, *HABEAS CORPUS* (1923); 2 T. SPELLING, *INJUNCTIONS AND EXTRAORDINARY REMEDIES* §§ 1151-1260 (1901).

corpus.<sup>38</sup> The uniform silence of all these authorities suggests that it is not the practice, and has never been the practice, to allow discovery in habeas proceedings. Habeas practice has limited depositions and interrogatories to use as evidence at the hearing. 28 U.S.C. § 2246 (1964) and reviser's note.

That the type of discovery embraced by the Civil Rules was not applicable to habeas corpus proceedings is made clear by examination of the discovery practice available in federal courts prior to adoption of the Rules.

"There were just four sources or authority for any proceeding involving discovery before trial in the federal courts. Those four sources were two statutes and two equity rules. The two statutes were 28 *United States Code*, section 639, dealing with depositions *de bene esse*, and 28 *United States Code*, section 644, dealing with depositions under *dedimus potestatum* and *in perpetuum*. . . . The two statutes applied in both law and equity cases. . . . As a matter of fact there was no discovery as such provided by the two statutes. They did not purport to do more than authorize depositions before trial for the purpose of obtaining proof, not for the purpose of discovery. Discovery was a mere accidental incident. The need for taking depositions as proof was the condition for taking them. The need for discovery had nothing to do with

<sup>38</sup>See E. BRAY, *DISCOVERY* (1885); T. HARE, *DISCOVERY* (3d Am. ed. 1850); W. KERR, *DISCOVERY* (1870); C. PEILE, *DISCOVERY* (1883); G. RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 27-31 (1932); R. ROSS, *DISCOVERY* (1912); J. WIGRAM, *DISCOVERY* (2d ed. 1840).



the matter. Thus, under section 639, dealing with depositions *de bene esse*, depositions were allowed when the witness lived more than one hundred miles from the place of trial, or was on a voyage at sea, or when the witness was aged or infirm, etc. . . . Section 644, for depositions under a *dedimus* or for perpetuation of testimony, prescribed that depositions could be taken only to prevent a failure or delay of justice. Those were limitations placed upon the taking. The special need for taking must appear from the circumstances of the particular case. And the statute also prescribed that the deposition must be taken according to common usage. The Supreme Court held, in *Ex parte Fiske* [113 U.S. 713, 724 (1885)], that calling upon a party in advance of trial to extract something which the other party might use or not as suited his purpose, was a very "special usage, based upon local statutes, and not within section 644. The incidental value of section 644 for discovery purposes was therefore exceedingly small. Furthermore, in law cases there was no discovery whatever, incidental or otherwise, in respect to documents. These could be called for in advance of the trial only by subpoena *duces tecum* in connection with depositions taken under one of the two statutes. There was therefore the same primary restriction upon discovery by documents as upon discovery by oral examination. Discovery of documents was purely incidental to the taking of proof." Sunderland, *The New Federal Rules*, 45 W. VA. L. Q. 5, 19-20 (1938).<sup>39</sup>

<sup>39</sup>Mr. Sunderland was a member of the Advisory Committee on Rules for Civil Procedure. His article is quoted in 2A W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 641, n. 10 at 12-13 (Wright rev. 1961).



The procedure attempted by the real party in interest below did not fall within any of these categories because the interrogatories were plainly intended for discovery (see A 34-35). It was not even similar to a deposition *de bene esse* since the witness was not more than 100 miles from the court, on a voyage, or infirm. It could not be considered a deposition under *dedimus potestatum*, since that deposition could not be used for discovery. *Ex parte Fiske*, 113 U.S. 713, 714 (1885); *Turner v. Shackman*, 27 F. 183, 184 (1886); *ibid.* Nor was it like a deposition *in perpetuum*, since that practice was permitted only when the party who filed the bill could not have the issue determined by immediate litigation. *E.g.*, G. BISPHAM, EQUITY § 35 at 53, § 573 at 858 (10th ed., McCoy rev., 1925) 1 J. POMEROY, EQUITY JURISPRUDENCE § 211 at 358 (5th ed., Symonds rev., 1941); 3 J. STORY, EQUITY JURISPRUDENCE § 1960 (14th ed., Lyon ed., 1918).<sup>40</sup> These limitations upon depositions—permissible only if obtained for evidentiary purposes—are the same as those now specifically set out in the Habeas Corpus Act. 28 U.S.C § 2246 (1964).

The only provision through which discovery could be obtained was Equity Rule 58. 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 641 at 11 (Wright rev. 1961); Sunderland, *The New Federal*

---

<sup>40</sup>"The jurisdiction in suits to PERPETUATE TESTIMONY arises where the fact, to which the testimony relates, cannot be immediately investigated at law, *e.g.*, where the person filing the bill has merely a future interest, or having an immediate interest, is himself in possession and not actually disturbed, though threatened by the defendant with disturbance at a future time." J. ADAMS, EQUITY 83-84 (8th ed., Ralston rev., 1890).

*Rules*, 45 W. VA. L. Q. 5, 20 (1938). Any discovery resulting from evidentiary depositions taken under Equity Rule 47 was merely accidental. Sunderland, *supra* at 20. Habeas corpus has always been considered a civil proceeding. *Fisher v. Baker*, 203 U.S. 174, 181 (1906). Though civil in nature, habeas corpus is *sui generis*. It is administered by courts of law rather than courts of equity. See *Goldsmith v. Valentine*, 36 App. D.C. 63, 66-67 (1910).<sup>41</sup> Consequently, the equity rules providing discovery did not apply to federal habeas proceedings.

Petitioner parries this argument by asserting that since a bill in equity in aid of an action at law was a tactic utilized to obtain discovery in civil cases, then this procedure provided a means of obtaining discovery in habeas corpus (Petitioner's Brief, p. 32). Not a single authority on equity practice which we have examined suggests that a bill of discovery could be brought in aid of a habeas corpus petition.<sup>42</sup> In fact,

<sup>41</sup>In *Fay v. Noia*, 372 U.S. 391, 438 (1963), this Court declared, "[H]abeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573 (dissenting opinion)." In *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573 (1953), in his dissenting opinion, Justice Frankfurter observed:

"I need hardly point out that in a court of equity causes are disposed of on the facts as they appear at the time of the disposition, and that habeas corpus is certainly to be governed by the rules of fairness enforced in equity."

Were habeas corpus a federal equitable remedy, these distinctions between the practice in habeas and that in equity would have been unnecessary.

<sup>42</sup>J. ADAMS, *EQUITY* 79-82 (8th ed., Ralston rev., 1890); G. BISPHAM, *EQUITY* §§ 556-65 (10th ed., McCoy rev., 1925); 2 E. DANIELL, *CHANCERY PLEADING AND PRACTICE* 1537-39 (6th Am. ed., Gould rev., 1894); J. EATON, *EQUITY JURISPRUDENCE* §§ 323-31 (2d ed., Throckmorton rev., 1923); N. FETTER, *EQUITY JURISPRUDENCE*

there were some limitations upon the bill which seem to preclude its use in habeas corpus.<sup>43</sup> But assuming that the bill was technically available, it is nevertheless obvious that it was completely unsuitable in habeas corpus.

Under the old Equity Rules, there were only two provisions involving any sort of discovery before trial. Sunderland, *The New Federal Rules*, 45 W. VA. L. Q. 5, 19 (1938). The first of these, Rule 47, allowed pre-trial depositions in exceptional cases, thus permitting "accidental" discovery. *Ibid.*

"Rule 47 authorized the taking of depositions of named witnesses for use at the trial for good and exceptional cause for departing from the general rule, the general rule being 'no depositions.' The purpose here was not discovery but obtaining proof." *Id* at 20.

Consequently, Rule 47 was not appropriate for discovery, and in fact provided for nothing more than an evidentiary deposition. Evidentiary depositions are now provided for in the Habeas Corpus Act. 28 U.S.C. § 2246 (1964).

---

§ 197 (1895); W. FLETCHER, EQUITY PLEADING AND PRACTICE §§ 804-24 (1902); E. MERWIN, EQUITY §§ 848-65 (H. Merwin ed. 1896); 1 J. POMEROY, EQUITY JURISPRUDENCE § 196 (5th ed., Symonds rev., 1941); 3 J. STORY, EQUITY JURISPRUDENCE §§ 1927-68 (14th ed., Lyon ed., 1918); J. STORY, EQUITY PLEADINGS §§ 311-25 (10th ed., Gould rev., 1892); see also authorities cited in note 38, *supra* at 62.

<sup>43</sup>A bill of discovery in aid of an action at law was not entertained where the controversy involved "moral turpitude" or arose "from acts clearly immoral." 1 J. POMEROY, EQUITY JURISPRUDENCE § 197 at 295 (5th ed., Symonds rev., 1941). Certainly the criminal acts which serve as the basis for a conviction would be "acts clearly immoral."

The other equity provision was Rule 58 which did permit pre-trial discovery and was the only discovery procedure available before adoption of the Federal Rules.

"Equity Rule 58 is the only provision in the entire federal system intended for discovery. That rule provided for three things, general discovery, discovery of documents and admissions. . . .

" . . . Equity Rule 58 is very restricted in its scope. It was available only to ascertain facts relating to the party's own case, not those of his adversary's case. . . . *It is nothing, in fact, but the discovery available under the old chancery bill of discovery.* . . .

"Further, Equity Rule 58 was very restricted as to the class of deponents; only parties could be interrogated, not mere witnesses." Sunderland, *supra*, 45 W. VA. L. Q. at 20-21 (emphasis added).

The old bill of discovery was narrowly restricted in scope and utility.

"In the common-law courts, prior to the modern statutory legislation, a party could not be examined as a witness. . . . It was to supply this grievous defect in the ancient common-law methods that equity established the first branch of its auxiliary jurisdiction, called discovery." 1 J. POMEROY, EQUITY JURISPRUDENCE § 190a at 274-75 (5th ed., Symonds rev., 1941).

Without discovery through a proceeding in equity, then, neither party could either give evidence or be examined. But ordinary witnesses were always compe-

tent to testify. Thus it was the rule that "a bill of discovery cannot be brought against one who is not a party in the original suit, but who is merely a witness, and may be examined as such." E. MERWIN, EQUITY § 865 (H. Merwin ed. 1896); accord, W. FLETCHER, EQUITY PLEADING AND PRACTICE § 808 at 861 (1902); 3 J. STORY, EQUITY JURISPRUDENCE § 1947 (14th ed., Lyon ed., 1918). Similarly, under Equity Rule 58, discovery could not be directed against mere witnesses. Sunderland, *supra*, 45 W. VA. L. Q. at 21.

The limited function of a "bill of discovery" as embraced in Equity Rule 58 also explains why it was never used in a habeas proceeding. The responding party in a habeas case has always been the custodian, and he offered no evidence, other than to present to the court the basis of detention, usually in the form of the judgment or warrant. It is apparent that the reason there are no cases granting a bill of discovery in aid of a habeas corpus proceeding, and no texts suggesting such a practice, is because it would have served no useful purpose: the bill could only have been directed against the custodian, and he was already required to show the basis of detention. This aspect of habeas practice is now covered by section 2243.

Before a practice sanctioned in the Federal Rules of Civil Procedure can be applied to habeas corpus, Rule 81(a) (2) requires that that practice conform to habeas practice prior to the adoption of the Rules. No case or text indicates that discovery procedures could be utilized in habeas proceedings prior to the Rules.



Analysis compels the conclusion that this silence is due to the fact that the prior discovery practice was wholly unsuited to the habeas corpus proceedings. Certainly the type of discovery sought here never existed in habeas practice prior to adoption of the Civil Rules in 1938. Consequently, the second criterion of Rule 81(a) (2) cannot be satisfied either.

The various authorities upon which petitioner relies do not suggest a contrary result (Petitioner's Brief, pp. 23-24, 28, 31).<sup>44</sup> None of them considered the legislative history of the habeas corpus exclusion, nor did they attempt to examine the practice at issue in light of the statutes and prior practice as is required by Rule 81(a) (2). Those cases which apparently assumed that the Rules apply are hardly authority for the proposition that the Federal Rules govern habeas corpus, especially in view of Rule 81 (a) (2).<sup>45</sup> Nor are those decisions which rested upon

<sup>44</sup>Some of petitioner's "authorities" are totally inapposite. *United States ex rel. Tillery v. Cavell*, 294 F.2d 12, 18 (3rd Cir. 1961), cert. denied, 370 U.S. 945 (1962), applied Rule 60(a) (correction of clerical errors) in the context of an appeal. But the Civil Rules *did* apply to habeas corpus appeals under former Rule 81(a)(2). Other cases which have utilized the Rules on appeal are equally inapt. See *Williams v. Babineaux*, 357 F.2d 481, 482 (5th Cir. 1966); *O'Keith v. Johnston*, 129 F.2d 889, 891 (9th Cir.), cert. denied, 317 U.S. 681 (1942); *Macomber v. Hudspeth*, 115 F.2d 114, 116 (10th Cir. 1940), cert. denied, 313 U.S. 558 (1941). Petitioner also relies upon *Harris v. North Carolina*, 240 F.Supp. 985, 989-90 (E.D. N.C. 1965), for the proposition that discovery interrogatories may be used in habeas corpus. However, a careful reading of the case indicates that the interrogatories were used as provided in section 2246 to test evidence submitted in affidavit form. See *id.* at 990.

<sup>45</sup>*Fortner v. Balkcom*, 380 F.2d 816, 818, 820-21 (5th Cir. 1967); *Molignaro v. Dutton*, 373 F.2d 729, 730 (5th Cir. 1967); *Rogers v. Bennett*, 320 F.2d 83, 86 (8th Cir. 1963); *Sullivan v. Dickson*, 283 F.2d 725, 727 (9th Cir.), cert. denied, 366 U.S. 951

the classification of habeas corpus as a "civil action" particularly persuasive.<sup>46</sup> Habeas corpus is actually *sui generis*, and "the uselessness of relying on the historical label of habeas corpus as a 'civil' proceeding . . . has been noted before." *Wilson v. Weigel*, 387 F.2d 632, n. 2 at 634 (9th Cir. 1967), citing *Sullivan v. United States*, 198 F.Supp. 624 (S.D. N.Y. 1961) (containing an excellent discussion of the "civil" analogy). Furthermore, Rule 81(a) (2) clearly establishes that habeas corpus cannot be con-

(1961); *Hammerer v. Huff*, 110 F.2d 113, 115 (D.C. Cir. 1939); *Bowen v. Boles*, 258 F.Supp. 111, 113 (N.D. W.Va. 1966); *United States ex rel. Bruno v. Herold*, 39 F.R.D. 570, 572 (N.D. N.Y.), rev'd on other grounds, 368 F.2d 187 (2d Cir. 1966); *Smith v. United States*, 174 F.Supp. 828, 830, 835 (S.D. Cal. 1959), appeal dismissed as untimely, 272 F.2d 228 (9th Cir. 1959), cert. denied, 362 U.S. 954 (1960); *Hamilton v. Hunter*, 65 F.Supp. 319, 320 (D. Kan. 1946). As this Court has previously noted, a case does not sanction a procedure where it is not at issue and "passed without notice." *Holiday v. Johnston*, 313 U.S. 342, 352 (1941).

<sup>46</sup>*Schiebelhut v. United States*, 318 F.2d 785, 787 (6th Cir. 1963); *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 61-64 (5th Cir. 1962), cert. denied, 372 U.S. 915 (1963); *Bowdidge v. Lehman*, 252 F.2d 366, 368 (6th Cir. 1958); *Estep v. United States*, 251 F.2d 579, 581-83 (5th Cir. 1958); *In re McShane*, 235 F.Supp. 262, 266 (N.D. Miss. 1964). Of these decisions, *Schiebelhut* is particularly weak for it relied upon an unpublished opinion involving the same petitioner wherein certiorari had been denied. *Schiebelhut v. United States*, *supra*. In his opposition to the petition for certiorari, the denial of which appears at 361 U.S. 973 (1960), the Solicitor General noted that the procedure adopted by the district court was intended to require the petitioner to clarify his petition and set out his allegations with greater specificity. Solicitor General's Brief in Opposition to Petition for Certiorari in *Schiebelhut v. United States*, No. 437 Misc., Oct. Term, 1959, at 4-5. The Solicitor General also suggested that the Civil Rules did not apply to section 2255 cases because of the exclusionary provisions of Rule 81(a) (2). *Id.*, n. 3 at 5. Insofar as *In re McShane*, *supra*, purports to utilize Rule 56 (summary judgment) to implement section 2243, it is also incorrect. The summary judgment procedure does not comport to that envisioned by this Court in *Walker v. Johnston*, 312 U.S. 275, 284-86 (1941).

sidered an ordinary civil action. *Knowles v. Gladden*, 254 F.Supp. 643 (D. Ore. 1965), simply misinterpreted section 2246. See Argument II, *supra* at pp. 19-22.

Many of the cases cited by petitioner are the mutant progeny of *Hunter v. Thomas*, 173 F.2d 810 (10th Cir. 1949). In *Hunter*, it was held that Rule 59 (motion for a new trial) could be applied to habeas corpus proceedings. After quoting Rule 81(a) (2) in a footnote, the court reasoned as follows:

"There is nothing . . . [in the habeas corpus statutes] which provides any procedure with respect to a new trial in a habeas corpus proceeding. Prior to the adoption of the Federal Rules of Civil Procedure, it was settled that a court could vacate an order discharging the petitioner on habeas corpus at any time during the term at which the order was entered.<sup>3</sup> Habeas corpus is a civil proceeding. . . . It would seem, therefore, that the provisions of Rule 59, applicable to cases tried without a jury, govern motions for a new trial in a habeas corpus proceeding." *Id.* at 812.

Footnote 3 referred to a habeas corpus case, *Tiberg v. Warren*, 192 F. 458, 462-63 (9th Cir. 1911), decided long before adoption of the Federal Rules, in which it had been determined that a new hearing could be ordered in a habeas corpus proceeding upon a showing of good cause therefor. The *Hunter* decision, then, went through the same analytical process as the Ninth Circuit in the case below, *Wilson v. Harris*, 378 F.2d 141, 143 (9th Cir. 1967), and determined that: (1) motions for a new trial were not otherwise provided for in the habeas corpus statutes, and (2)

motions for new trial had been permitted in habeas corpus proceedings prior to adoption of the Federal Rules. Therefore, the *Hunter* case properly applied Rule 59 to habeas corpus proceedings.

The cases which followed *Hunter*, however, overlooked this analysis and consequently misinterpreted the result. *Bowdidge v. Lehman*, 252 F.2d 366, 368 (6th Cir. 1958), cited *Hunter* for the proposition that "habeas corpus is a civil proceeding governed by the Federal Rules of Civil Procedure. . . ." *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 64 (5th Cir. 1962), cert. denied, 372 U.S. 915 (1963), quoted this statement from *Bowdidge*, including the citation to *Hunter*, and reached the same conclusion. In *Abel v. Tinsley*, 338 F.2d 514, 516 (10th Cir. 1964), some 15 years after *Hunter*, an astounding mutation occurred. The court there reasoned that because *United States ex rel. Seals v. Wiman* (discussed *supra*) had applied Rule 36, *Macomber v. Hudspeth* (discussed *infra*) had applied Rule 52, *Bowdidge v. Lehman* had applied Rule 56, and *Hunter v. Thomas* had applied Rule 59, then Rule 60 had to apply too. The patent fallacy of this logic appears when the premises from which *Abel v. Tinsley* reasons are examined. *United States ex rel. Seals v. Wiman* assumed that the Federal Rules applied because habeas corpus is "civil" in nature, and also misinterpreted *Hunter*. *Bowdidge* cited *Hunter*, but ignored the analysis therein. And *Macomber v. Hudspeth*, 115 F.2d 114, 116 (10th Cir. 1940), cert. denied, 313 U.S. 558 (1941), held that Rule 52 applies to habeas corpus appeals; a result clearly commanded by former Rule 81(a) (2) and



having nothing to do with the applicability of the Rules in the district courts. Therefore these post-*Hunter* cases stand more as an unexpected example of Mendel's laws than as a proper interpretation of the Federal Rules.

Petitioner also cites *Knowles v. Gladden*, 254 F. Supp. 643, 644-45 (D. Ore. 1965), and *Smith v. United States*, 174 F. Supp. 828, 830, 835 (S.D. Cal. 1959), appeal dismissed as untimely, 272 F.2d 228 (9th Cir. 1959), cert. denied, 362 U.S. 954 (1960), as authority for the proposition that discovery techniques have been recently authorized by courts invoking the Federal Rules.<sup>47</sup> Of course, the *Knowles* decision is in conflict with three other cases: *Wilson v. Weigel*, 387 F.2d 632 (9th Cir. 1967); the decision below, *Wilson v. Harris*, 378 F.2d 141 (9th Cir. 1967); *Sullivan v. United States*, 198 F.Supp. 624 (S.D. N.Y. 1961). Similarly, there is also a case which is contrary to the *Smith* decision: *United States v. Burdette*, 161 F.Supp. 326, 331 (E.D. Mich. 1957), aff'd, 254 F.2d 610 (6th Cir. 1958), cert. denied, 359 U.S. 976 (1959). In any event these cases are irrelevant, for they were decided at least twenty years after the Federal Rules had been adopted and thus cannot be classified as the "practice" in habeas corpus cases prior to 1938 as is required under Rule 81(a) (2).

---

<sup>47</sup>The fundamental error in *Knowles v. Gladden* has already been demonstrated. See Argument II, *supra* at pp. 19-22. *Smith v. United States* is also of dubious value since Rule 35 was merely assumed to apply. See notes 22 and 45, *supra*, and accompanying text.



**CONCLUSION**

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals should be affirmed.

Dated, October 25, 1968.

**THOMAS C. LYNCH,**

Attorney General of the State of California,

**ALBERT W. HARRIS, JR.,**

Assistant Attorney General of the State of California,

**DERALD E. GRANBERG,**

Deputy Attorney General of the State of California,

**CHARLES R. B. KIRK,**

Deputy Attorney General of the State of California,

*Attorneys for Respondent.*

**(Appendix Follows)**

## Appendix

---

### UNITED STATES CODE—TITLE 28

#### § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

#### § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

#### § 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

**§ 2243. Issuance of writ; return; hearing; decision**

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

#### **§ 2244. Finality of determination**

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgement of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been



denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

**§ 2245. Certificate of trial judge admissible in evidence**

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

**§ 2246. Evidence; depositions; affidavits**

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

**§ 2247. Documentary evidence**

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

**§ 2248. Return or answer; conclusiveness**

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

**§ 2249. Certified copies of indictment, plea and judgment; duty of respondent**

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, the same shall be attached to the return to the writ, or to the answer to the order to show cause.

**§ 2250. Indigent petitioner entitled to documents without cost**

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

**§ 2251. Stay of State court proceedings**

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

#### § 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

#### § 2253. Appeal

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or

judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

**§ 2254. State custody; remedies in Federal courts**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the



the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is

produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such per-

minent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

**FEDERAL RULES OF CIVIL PROCEDURE****Rule 1.****SCOPE OF RULES**

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

**Rule 33.****INTERROGATORIES TO PARTIES**

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written

objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

**Rule 81(a)(2).**

These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.



*In the Court of Appeal  
State of California  
First Appellate District*

DIVISION TWO

1 Criminal No. 4543

People of the State of California,  
Plaintiff and Respondent,

vs.

Alfred Walker,  
Defendant and Appellant.

OPINION

(Not to be Published)

Defendant Alfred Walker appeals from a judgment convicting him of possession of marijuana for sale, in violation of Health and Safety Code, section 11530.5, with two prior felony convictions.

At approximately 12:30 p.m. on August 9, 1963, Edward Hilliard, an Oakland police officer attached to the Vice Control Section, received a telephone call from a female informant. The officer had known the informant, a special employee of the section, for two years. He considered her a reliable informant and testified that she had previously furnished him with

information leading to the arrest and conviction of at least one person.

On this occasion, the informant reported that she had met a man who had just come to Oakland from San Francisco and who had five bags of marijuana for sale. Although she did not know the man's name, she stated that he had taken Room 3 at the Dunbar Hotel, and that he intended to sell the marijuana as soon as possible and return to San Francisco.

Upon receiving this information, Hilliard instructed the informant to meet him near the Dunbar Hotel. He and Officer Walker then proceeded to the agreed location, furnished the informant with a \$20 bill, the serial number of which had been recorded, and instructed her to go to Room 3 of the hotel and attempt to make a purchase of marijuana from the person in question. No attempt to search the informant was made.

The informant then drove to the hotel in her own car, with the officers following at a distance in another car. She entered the hotel and remained out of sight of the officers for approximately five minutes. Upon emerging from the hotel, she got into her car and drove to a prearranged spot, with the officers following. She then gave Hilliard a brown paper bag containing a vegetable substance which he took to be marijuana. The informant stated that she had purchased the bag from the man who was in bed in Room 3. She further stated that he had taken it from a larger bag which was under the mattress and which contained several other small bags. The officers did

not search the informant to see if she still had the \$20 bill in her possession.

The officers then returned to the Dunbar Hotel, and Hilliard proceeded to Room 3 while Walker remained on the street where he could observe the window of said room. After Hilliard had knocked repeatedly on the door of the room without receiving any response, he went to the hotel manager's room to obtain a key. The manager then accompanied Hilliard and Walker to Room 3 and unlocked the door. Appellant was asleep in bed. Hilliard awakened him and identified himself as a police officer. Upon observing certain scars on the inside of appellant's elbows, Hilliard inquired as to their nature, and appellant replied that he had been using Percodan, a synthetic narcotic, for the last five days. Upon further questioning, he admitted that he had obtained the Percodan without a prescription. When asked whether he had Percodan or the equipment for injecting it in the hotel room, appellant replied in the negative, stating that he had used it up. The officer then asked if he could look around the room, and appellant replied, "Sure, go ahead and look. There is nothing here."

After placing appellant under arrest for the illegal use of narcotics, Hilliard lifted the mattress on the bed and recovered a brown paper bag which contained four small bags, three cigarettes, and a package of wheat straw papers. The cigarettes and the contents of the four small bags were subsequently analyzed and found to be marijuana. When Hilliard showed

these items to appellant, he stated that he had discovered the large bag under the mattress when he rented the room. When asked what he intended to do with it, he replied that he wanted to sell it to make some money. Although appellant was searched by the officers, the \$20 bill which had been given to the informant was never found.

Appellant testified that he lived in Berkeley, but had gone to San Francisco by bus on the evening preceding his arrest in order to see a friend about a job. He had taken two Percodan tablets before leaving for San Francisco. After arriving in San Francisco, appellant met his friend and talked with him until 8:30 or 9:00 a.m. on the following morning. He then encountered the informant, who was known to him by sight, and offered her 50 cents to drive him to Oakland, where he intended to meet with another friend who lived one block from the Dunbar Hotel. The informant agreed and, after driving appellant to Oakland, suggested that he rent a room at the Dunbar Hotel and get a bath and some sleep. Appellant entered the hotel with the informant, who asked the clerk for Room 3 and signed the register as "Mr. and Mrs. Johnny Joseph." After appellant had paid the clerk \$3, the informant accompanied him to Room 3 and looked around to see that everything was in order. She then left to obtain more towels, but never returned to the room. Appellant took a bath and then went to sleep in the bed. He heard no knock on the door and awoke only when Hilliard shook him. He denied ever having seen the large brown bag or its contents until it was removed

from under the mattress, and also denied having made any statement to the contrary. He further stated that he had only 17 cents left after paying for the room, that this was the total amount taken from him after his arrest, and that he had no \$20 bill in his possession.

Appellant does not challenge the sufficiency of the evidence, but contends that the judgment should be reversed because evidence that was obtained by an illegal search and seizure was erroneously admitted. He asserts, more specifically, that he never gave his free and voluntary consent to the search of his hotel room, and that said search cannot be deemed incidental to a lawful arrest because the police lacked reasonable cause for such arrest and relied solely upon information supplied by an informant who was not searched before and after she allegedly purchased marijuana from appellant and who was not kept under constant surveillance so as to exclude the possibility of her having obtained it from another source.

This argument is wholly without merit, and is apparently based upon the erroneous assumption that evidence of information supplied by an informant cannot constitute reasonable cause for an arrest unless such evidence is in itself sufficient to support a conviction.

It is settled that information from a reliable informant is sufficient to sustain a finding that an arrest was made with reasonable cause and that such information need not be confined to evidence which would be admissible at the trial on the issue of guilt.



(People v. Prewitt (1959) 52 Cal.2d 330, 337; People v. Gonzalez (1956) 141 Cal.App.2d 604, 606<sup>1</sup>; Trowbridge v. Superior Court (1956) 144 Cal.App.2d 13, 17.) In the present case, Officer Hilliard testified that the informant had served as a special employee of the Oakland Police Department for two years, that he considered her reliable, and that she had in the past provided information which led to the arrest and conviction of at least one person. Under such circumstances, the officer's failure to search her before and after she entered the hotel and to keep her under surveillance at all times did not render valueless the information furnished by her. In view of her known reliability, the officer was clearly justified in believing the information which she gave him and in arriving at the reasonable conclusion that the occupant of Room 3 was offering marijuana for sale. Since the officer accordingly had reasonable cause for arresting appellant (Pen. Code, § 836), it follows that a search incidental to such arrest was entirely proper (People v. Dixon (1956) 46 Cal.2d 456, 458-459), and it is unnecessary to determine whether appellant freely consented thereto.

Judgment affirmed.

Shoemaker, P. J.

We concur:

Agee, J.

Taylor, J.

Filed October 15, 1964,

Lawrence R. Elkington, Clerk.

---

<sup>1</sup>Disapproved on other grounds in Priestly v. Superior Court (1958) 50 Cal.2d 812, 819.

# In the Supreme Court

LIBRARY  
SUPREME COURT, U. S.

OF THE  
**United States**

OCTOBER TERM, 1968

**No. 199**

Office Supreme Court, U.S.  
FILED

NOV 30 1968

JOHN F. DAVIS, CLERK

GEORGE B. HARRIS, Judge of the United States  
District Court for the Northern District of California,  
*Petitioner,*

vs.

LOUIS NELSON, Warden, California  
State Prison at San Quentin,  
*Respondent.*

## RESPONDENT'S SUPPLEMENTAL BRIEF,

Joined In and Adopted by the States of Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, and Wisconsin, The Territory of Guam, and The National District Attorneys' Association, Appearing as Amici Curiae.

THOMAS C. LYNCH,

Attorney General of the State of California,

ALBERT W. HARRIS, JR.,

Assistant Attorney General of the State of California,

DERALD E. GRANBERG,

Deputy Attorney General of the State of California,

CHARLES R. B. KIRK,

Deputy Attorney General of the State of California,

6000 State Building,

San Francisco, California 94102,

Telephone: 557-0357,

*Attorneys for Respondent.*

(The names of attorneys appearing for amici curiae are listed inside Respondent's Opening Brief.)

**In the Supreme Court**  
**OF THE**  
**United States**

---

**OCTOBER TERM, 1968**

---

**No. 199**

---

**GEORGE B. HARRIS, Judge of the United States**  
**District Court for the Northern District of California,**  
*Petitioner,*

**vs.**

**LOUIS NELSON, Warden, California**  
**State Prison at San Quentin,**  
*Respondent.*

---

**RESPONDENT'S SUPPLEMENTAL BRIEF,**

**Joined In and Adopted by the States of Alabama, Arizona,**  
**Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii,**  
**Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Mary-**  
**land, Massachusetts, Minnesota, Mississippi, Nebraska,**  
**Nevada, New Jersey, New Mexico, New York, North**  
**Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania,**  
**Rhode Island, South Carolina, Tennessee, Vermont,**  
**Virginia, Washington, and Wisconsin, The Territory**  
**of Guam, and The National District Attorneys'**  
**Association, Appearing as Amici Curiae.**

**ARGUMENT**

**SINCE PETITIONER DID NOT APPROPRIATELY PRESENT THE "INHERENT POWER" ISSUE TO THE COURT OF APPEALS, IT CANNOT BE RAISED NOW.**

In Argument I, at page 15, of respondent's brief herein, we noted that petitioner had not raised the "inherent power" argument in the Court of Appeals. On Wednesday, November 13, 1968, Mr. J. Stanley Pottinger, counsel for petitioner, telephoned and directed our attention to pages 4-8 of his supplemental brief filed in the Court of Appeals.<sup>1</sup> Those pages do indeed discuss "inherent power," but we do not view them as squarely presenting the issue to the Court of Appeals.

The "inherent power" concept was not relied on in the District Court, and the District Court did not purport to invoke it in issuing its order (see A 34-35, 39). Nor was "inherent power" discussed in petitioner's initial brief in the Court of Appeals. At oral argument, the Court of Appeals requested supplemental briefs directed to the requirements of former Rule 81(a)(2). Petitioner's supplemental brief, sub-

---

<sup>1</sup>We initially questioned petitioner's standing to argue this point in our response in opposition to the petition for certiorari. Mr. Pottinger also informed us that after our response had been filed, he filed a reply thereto in which he referred to pages 4-8 of his supplemental brief. Unfortunately, however, we did not receive a copy of that reply, for a check made after Mr. Pottinger's telephone call disclosed no notation of receipt in our mail-clerk's docket, nor did our files herein contain a copy. None of the attorneys responsible for the preparation of the briefs herein could recall having seen a "reply."

We do note, however, that Mr. Pottinger has since provided us with a copy of that reply, which we received on November 26, 1968.

mitted thereafter, contained four arguments, which were presented under the following headings:

- "I. Discovery in habeas corpus proceedings conforms to prior discovery practices in actions at law and suits in equity."
- "II. The rules providing for discovery have not been precluded by statutes of the United States."
- "III. The applicability of discovery rules to habeas corpus proceedings will not lead to abuse or oppression."
- "IV. Service of interrogatories under Rule 33 rather than Rule 26 was proper, and should not be a controlling consideration in the present action."

On pages 4-6 of this supplemental brief, the "inherent power" material appears as part of the first argument relating to "prior discovery practices." But we did not, and do not, read these pages as properly presenting a new basis for supporting the order of the District Court. Nor, apparently, did the Court of Appeals, for that court did not discuss "inherent power" in its decision.

Petitioner discussed "inherent power" to buttress his argument that "discovery in habeas corpus proceedings conforms to prior discovery practices in actions at law and suits in equity." After discussing the discovery permitted in civil actions prior to the adoption of the Federal Rules in 1938, petitioner argued:

"It should also be pointed out that the courts have had the power and jurisdiction to order dis-



covery not only under the Equity Rules mentioned above, but also according to their inherent power. This inherent power predates the adoption of the Federal Rules of Civil Procedure, and discovery engaged according to this power has been practiced generally prior to such Rules. See *United States v. Nolte*, 39 F.R.D. 359 (N.D. Cal. 1965). See also *Shores v. United States*, 174 F.2d 838 (8th Cir. 1949), and *United States v. Pete*, 111 F. Supp. 292 (D.D.C. 1953), and *United States v. Taylor*, 25 F.R.D. 225 (E.D. N.Y. 1960). Each of these cases, and others mentioned in *Nolte*, further establish the courts' power to order discovery not solely according to the jurisdiction of the Federal Rules, but also under their residual power to be exercised in the interests of justice. Although these cases are criminal rather than civil, the inherent power exercised there is relevant to habeas corpus actions. The courts have exercised their inherent power to obtain discovery because of the traditional practice of giving the utmost protection to a person's life and liberty typically at stake in criminal cases. These aspects of criminal cases are also present in habeas corpus proceedings. In such proceedings the courts have always exercised great flexibility in taking evidence and employing procedures appropriate to the particular cases before them, for the protection of the petitioner's fundamental rights. See 1 Bailey, *Habeas Corpus and Special Remedies* (1913). These established discretionary practices stem from and are a part of the same inherent powers exercised by the courts in criminal cases, including the practice of compelling discovery.

"That the courts have not until recently exercised their powers (inherent or statutory) to engage in discovery in habeas corpus proceedings does not indicate in any way that such discovery was not indulged in to some extent, or that it could not have been indulged in to a great extent. Nor should a lack of frequent discovery be construed as a prohibition against it now. General discovery failed to take place in the late nineteenth century and early twentieth century because the writ of habeas corpus was at that time a very limited writ, in small use, exercised largely as a summary proceeding without need for discovery." (Petitioner's [Respondent below] Supplemental Brief, pp. 4-6).

Petitioner used the "inherent power" argument to support his claims insofar as "prior discovery practices" were concerned. This is made abundantly clear by: (a) his placement of the "inherent power" discussion in Argument I; (b) his efforts to avoid the fact that the cases cited were decided after the Federal Rules were adopted and that no habeas corpus case had invoked "inherent power" either before or after the Rules were promulgated; and (c) his failure to urge "inherent power" as a separate basis for sustaining the District Court, without regard to whether the exercise of "inherent power" to permit discovery in habeas corpus had ever been practiced in habeas corpus before 1938. We do not believe that petitioner's present argument was properly before the court below. Since petitioner urged this as part of his "prior discovery practices" argument in the Court

of Appeals, he should not now be permitted to transform it to a separate basis irrespective of prior practice in habeas corpus.

---

### CONCLUSION

For the foregoing reasons, we respectfully submit that since it was not appropriately presented to the Court of Appeals, the "inherent power" issue is not properly before this Court and should be disregarded for the reasons set out in Argument I of Respondent's Brief.

Dated, November 29, 1968.

**THOMAS C. LYNCH,**

Attorney General of the State of California,

**ALBERT W. HARRIS, JR.,**

Assistant Attorney General of the State of California,

**DERALD E. GRANBERG,**

Deputy Attorney General of the State of California,

**CHARLES R. B. KIRK,**

Deputy Attorney General of the State of California,

*Attorneys for Respondent.*

Office: Supreme Court, U.S.

FILED

DEC 5 1968

JOHN F. DAVIS, CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District Court  
for the Northern District of California,

*Petitioner,*

*against*

LOUIS NELSON, Warden,

*Respondent.*

**BRIEF FOR THE STATE OF NEW YORK  
AS AMICUS CURIAE**

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
*Attorney Amicus Curiae*  
80 Centre Street  
New York, N. Y. 10013

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

AMY JUVILER

JOEL H. SACHS

Assistant Attorneys General,  
*of Counsel.*

## TABLE OF CONTENTS

---

	PAGE
Interest of <i>Amicus</i> .....	1
Summary of Argument .....	2
POINT I—The discovery provisions of the Federal Rules of Civil Procedure are inapplicable in a habeas corpus proceeding and inconsistent with its nature and purposes .....	3
POINT II—The unique and flexible hearing provided for habeas corpus cases is sufficient to provide full and fair disclosure of relevant facts without the superimposition of a discovery procedure neither designed nor appropriate for use in a summary proceeding .....	14
A. Discovery Has Been Used in Habeas Corpus Only in Rare Instances and Its Absence Has Been no Impediment to Full and Fair Consideration of the Allegations of State Prisoners .....	16
B. The Statutory Purposes for Which Discovery Was Designed Are Not Relevant to the Flexible Summary Habeas Corpus Proceeding .....	21
C. The Factors Which Limit the Abuse of the Discovery Rules by Civil Litigants Would be Ineffective in Habeas Corpus Cases .....	24
Conclusion .....	31



## TABLE OF CASES

## PAGE

Townsend v. Sain, 372 U. S. 293 .....	4, 5, 6, 7, 11, 15, 19
Fay v. Noia, 372 U. S. 391 .....	4, 6, 27, 29
Brown v. Allen, 344 U. S. 443 .....	5, 6, 7
Holiday v. Johnston, 313 U. S. 342 .....	5
Hickman v. Taylor, 329 U. S. 495 .....	7, 13, 22, 23
Sullivan v. United States, 198 F. Supp. 624 (S.D.N.Y. 1961) .....	8
Michaelson v. United States, 266 U. S. 42 .....	12
Miner v. Atlass, 363 U. S. 641 .....	12, 13
Roberts v. Nelson, Oct. Term 1967, No. 1407 Misc. ....	16, 23
Wilson v. Weigel, 387 F. 2d 632 (9th Cir. 1967) .....	16, 24
Fortner v. Balcom, 380 F. 2d 816 (5th Cir. 1967) ....	16, 20
Molignaro v. Dutton, 373 F. 2d 729 (5th Cir. 1967) ..	16, 20
Rodgers v. Bennett, 320 F. 2d 83 (8th Cir. 1963) ....	16
Sullivan v. Dickson, 283 F. 2d 725 (9th Cir. 1960) ..	17
Schiebelhut v. United States, 318 F. 2d 785 (6th Cir. 1963) .....	17, 20
United States ex rel. Seals v. Wiman, 304 F. 2d 53 (5th Cir. 1962) .....	17
Knowles v. Gladden, 254 F. Supp. 643 (D. Ore. 1965) ..	17, 20
Harris v. North Carolina, 240 F. Supp. 985 (E.D.N.C. 1965) .....	17
Smith v. United States, 174 F. Supp. 828 (S. D. Cal. 1959) .....	17, 20
United States ex rel. Raymond Figueroa v. McMann, File 68 Civ. 235 (S.D.N.Y. 1968) .....	18, 20

# TABLE OF CONTENTS

iii

## PAGE

Wilson v. Harris, 378 F. 2d 141 .....	19, 24
Brady v. Maryland, 373 U. S. 83 .....	20
United States v. Proctor & Gamble Co., 356 U. S. 677 .....	23
Richter v. Union Trust Co., 115 U. S. 55 .....	24
Diggs v. Welch, 148 F. 2d 667 (D. C. Cir. 1945) .....	26

## STATUTES CITED

Judiciary Law, 28 U.S.C. §§ 2241-54 (Pub. L. 89-711, Nov. 2, 1966) .....	4, 10
Federal Rules of Civil Procedure, Rules 26-37 .....	5, 11, 13
Rules 1 and 8(a) .....	6
Rule 33 .....	6, 8
Rule 26 .....	8, 9, 15, 20
Rules 30(d), 33, 37 .....	11
Rule 16 .....	12
Rule 27b .....	24
Rule 30b .....	26
28 U.S.C. 1651 .....	5, 6
28 U.S.C. 2242 .....	8
28 U.S.C. 2243 .....	10, 24, 27
28 U.S.C. 2246 .....	8
28 U.S.C. 2249 .....	9, 11, 15
28 U.S.C. 2253 .....	29
28 U.S.C. 2254 .....	9, 11, 15, 19
28 U.S.C. 2072 .....	13
Federal Rules of Criminal Procedure, Rule 16(F) .....	27, 28

MISCELLANEOUS AUTHORITIES	PAGE
Moore's Federal Practice, 1.03[1] 2nd id. 1967 .....	5
Moore's Federal Practice, ¶ 26.02[4] .....	22
Moore's Federal Practice ¶ 30.06 .....	27
Civil Discovery in Habeas Corpus, 67 Colum. L. Rev. 1296, 1304 (1967) .....	13
374 U. S. 865, 866-68 (Dissent of JJ. Black and Douglas to the Transmission of the Federal Rules of Civil Procedure) .....	13
Am. Bar Assoc. Project on Minimum Standard for Criminal Justice, Standards Relating to Post- Conviction Remedies, Tentative Draft, Jan. 1967 .....	21, 27
Pre-Trial Suggestions for Section 2255 Cases, 32 F.R.D. 393 (1963) .....	21
Tactical Use of and Abuse of Depositions Under the Federal Rules, 59 Yale Law Journal 117ff (1949) .....	25, 30
The Use of Discovery in United States District Courts, 60 Yale Law Journal 1133, Speck, Wm. H.	27

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1968

---

No. 199

---

GEORGE B. HARRIS, Judge of the United States District Court  
for the Northern District of California,

*Petitioner,*

*against*

LOUIS NELSON, Warden,

*Respondent.*

---

**BRIEF FOR THE STATE OF NEW YORK  
AS AMICUS CURIAE**

---

**Interest of Amicus**

The Attorney General of the State of New York represents the respondent State custodians in all habeas corpus actions including those brought in the Federal courts by New York prisoners. Moreover, as the chief legal officer of the State (New York Executive Law, § 63), he represents the State offices, officers and employees who would be potential subjects of discovery orders if the Federal Rules of Civil Procedure were held to give habeas corpus applicants the power to demand information on which to base their attacks on official State Court judgments.

Because of this dual responsibility and because the extension of the Federal Rules for discovery to habeas corpus applications would profoundly affect the fundamental nature of the writ, the New York Attorney General files this brief as *amicus curiae* pursuant to Rule 42 of the Rules of this Court.

The brief of the California Attorney General thoroughly disposes of petitioner's claim that Rules 1 and 81(a) do not effectively preclude application of the Civil Rules regarding discovery to habeas corpus proceedings. We therefore join in that brief and adopt its erudite arguments. In this brief, we place our principal emphasis on the policy considerations which make discovery undesirable in habeas corpus and those which militate against the invocation of the Court's inherent power to enable the parties to examine each other and third persons without the supervision of that Court.

### **Summary of Argument**

The position of the New York Attorney General does not stem from any fear that the use of the civil discovery procedure will expose secret, embarrassing or damaging information nor that its use will open wide our prison gates. Nonetheless, we feel that making discovery, as described in the Federal Rules of Civil Procedure, available on habeas corpus would encumber and delay this plenary and hopefully speedy proceeding and would impose considerable burdens on the Court, on respondents and on potential witnesses, both public and private.

Of course, those burdens could be borne, if such discovery were necessary to enable an applicant to substantiate a good faith constitutional claim against his State conviction. However, the flexibility in kind and in scope of the hearing provided in habeas corpus proceedings is all that is required for a full and fair consideration of such claims. Therefore, the Federal Rules of Civil Procedure for discovery are as unnecessary in habeas corpus cases as they would be cumbersome.

Habeas corpus applications in the Federal courts attacking prior State judgments typically are made after a post-conviction proceeding in the State courts where the applicant has had an opportunity to attack the original judg-



ment collaterally. Therefore, all relevant information or all sources of such information are known to the applicant before he initiates the Federal proceeding. Furthermore, an applicant must delineate his constitutional claims and their factual basis before Federal jurisdiction attaches, there being no presumption of unconstitutionality merely because he has been convicted of a crime. Thus, since such claims are a necessary precondition of federal jurisdiction, discovery would not aid in defining the issues. Once defined, if the claims are sufficient on their face to warrant the issuance of a writ, the flexible plenary hearing provided in habeas corpus cases is promptly available, obviating applications for discovery, protective orders and all the procedural appendages of the Civil Rules relating to discovery.

Pre-trial discovery is not an essential of habeas corpus procedure. What is required in the first instance is an efficient method for sorting out non-meritorious claims and for disposing of them speedily and with finality. In the second place, habeas corpus requires that there be a forum for a full and fair exploration of the meritorious contentions. The use of discovery as provided for in the Civil Rules would seriously impair the speedy disposal of non-meritorious claims while unnecessarily formalizing and limiting the broad fact finding power of the Court in hearing the meritorious contentions.

### POINT I

The discovery provisions of the Federal Rules of Civil Procedure are inapplicable in a habeas corpus proceeding and inconsistent with its nature and purposes.

When a state prisoner applies to the federal courts for a writ of habeas corpus he initiates perhaps the most unique proceeding presently provided by law. He correctly labels his proceeding civil, but he is concerned with

the criminal process. He initiates an original cause of action, but he seeks to review prior judicial proceedings. He invokes federal rights in a federal court, but, in fact, the issue is the validity and sufficiency of state statutes, judgments and procedures.

Habeas corpus has judicially evolved from a technical writ to a full-scale collateral examination of the validity of state judgments by the federal courts. As such, it relies heavily on state court records. To the extent that it examines the proceedings leading to conviction it often traverses the same ground covered in the state court. To the extent that comity requires that the state courts have the first opportunity to re-examine their judgments, it must traverse those same issues. And to the extent that the jurisdiction of the federal courts rests on their duty to relieve unconscionable custody, habeas corpus must be a speedy summary proceeding designed for expeditious assessment of the issues and granting of relief.

Procedures governing habeas corpus are found in Judiciary Law, 28 U.S.C. §§ 2241-54 (hereinafter the habeas corpus statute) which was most recently amended in 1966 (Pub. L. 89-711, Nov. 2, 1966). These procedures reflect the Constitutional basis of the writ, Article 1, § 9 and the Fourteenth Amendment. Decisional law of this Court has been extremely important in defining the nature and procedures of habeas corpus. In 1963 this Court revolutionized the practice and procedure of the federal writ substantially extending its availability to state prisoners. *Townsend v. Sain*, 372 U. S. 293; *Fay v. Noia*, 372 U. S. 391.

The Federal Rules of Civil Procedure, on the other hand, were designed for original plenary civil actions and thus are in large part inappropriate to the peculiarities of habeas corpus. In the instant case, petitioner suggests a number of sources of habeas corpus procedures to support

his argument that the liberal discovery available in plenary federal civil cases (Federal Rules of Civil Procedure, Rules 26-37) is also available in habeas corpus. However, in the original service of interrogatories and in petitioner's argument to the Court of Appeals, the sole basis of authority alleged was the Federal Rules. Petitioner's brief in this Court recognizing the weakness of that claim, relies in the first place on the decisional law of this Court (*Townsend v. Sain, supra*; *Brown v. Allen*, 344 U. S. 443), in the second, on the inherent power of the District Court in aid of its jurisdiction, in the third, on the "All writs" statute (28 U.S.C. 1651) and only as a last resort, on the Rules of Civil Procedure. It ignores the basic source for the procedural framework of habeas corpus, the statute. See *Holiday v. Johnston*, 313 U. S. 342, 353.

The brief for *Amicus curiae*, the National Association for the Advancement of Colored People, Legal Defense and Education Fund, Inc. and the National Office for the Rights of the Indigent (hereinafter Legal Defense Fund), criticizes the habeas corpus statute for not containing the pre-trial and trial procedures which make up the bulk of the Federal Rules (L.D.F. brief, p. 7). This freedom from procedural bulk is precisely what makes habeas corpus a flexible, efficient, summary mechanism for redressing extraordinary grievances.

Professor J. W. Moore has stated generally:

"The Federal Rules were primarily designed for plenary litigation, and cannot, therefore, be wholly applicable to proceedings which are summary in nature."

*Moore's Federal Practice*, 1.03 [1] (2nd ed. 1967)

The Civil Rules relating to discovery are an excellent example of a procedure which is necessary and effective in an original plenary action but which would interfere with the prompt and effective operation of a summary proceeding.

The Civil Rules wisely take into account the peculiarities of the writ of habeas corpus and specifically exclude habeas corpus proceedings from their general coverage, excepting only habeas corpus appeals. Federal Rules of Civil Procedure, Rules 1 and 8(a).

The decision of the Court below and the California Attorney General's brief in this Court demonstrates that this textual exclusion is determinative against petitioner's claim. The District Court's order was based only on a finding that interrogatories under Rule 33 were available to a habeas corpus applicant. No other authority was necessary and the Court did not find that the order was justified by reason of its inherent power in aid of its jurisdiction by the decisional law of this Court or by the "All Writs" statute.\*

- o Petitioner's principal judicial authority is not *Townsend v. Sain, supra*; *Fay v. Noia, supra*, and the progeny thereof but, curiously, on *Brown v. Allen, supra*, since a footnote in the opinion of Mr. Justice Reed stated *inter alia*:

"Of course, the other usual methods of completing the record in civil cases, such as subpoena duces tecum and discovery, are generally available to the applicant and respondent. If useful records of prior litigation are difficult to secure or unobtainable, the District Court may find it necessary or desirable to hold limited hearings to supply them where the allegations of the application for habeas corpus state adequate grounds for relief." (*Id.* at 464, n. 19.)

Needless to say, *Brown v. Allen* no longer provides the procedural framework for federal writs of habeas corpus. It has been superseded and directly overruled by *Town-*

---

\* We do not treat petitioner's claim under the "All Writs" statute since this argument has been adequately answered by the brief of California Attorney General in which we join.

send, *supra* at 312-313. In any event, footnote 19 was dictum and the reference to discovery a casual afterthought. The footnote refers to habeas corpus statutory provisions regarding the obtaining of evidence and its effect was to limit the occasions wherein a factual hearing was required. This is the aspect of *Brown v. Allen, supra*, which was specifically overruled by this Court in *Townsend, supra*. The footnote is part of only one of the seven opinions in that case, there being no majority.

This Court's description of habeas corpus in its subsequent opinion in *Townsend v. Sain, supra*, is inconsistent with the use of discovery in habeas corpus. In the first place, it puts great responsibility for formulating the issues and ascertaining the facts upon the District Court (*id.* at 316-319), while discovery is a tool of a truly adversary proceeding wherein the parties must formulate the issues and ascertain the facts with as little supervision from the Court as possible. Second, the opinion in *Townsend v. Sain, supra*, thoroughly describes procedures for handling issues in habeas corpus, but contains no hint that discovery can be used. This omission cannot be attributed to inadvertence or irrelevance, since discovery is a matter of such importance that it is not easily overlooked. *Hickman v. Taylor*, 329 U. S. 495, 500. That aspect of the decision which specifically discussed the power of the District Court to compel the production of evidence would have been unnecessary if the parties had available the particular discovery enacted by the Rules. Since the purposes of the opinion in *Townsend* was to "... provide answers for all aspects of the hearing problem for the lower federal courts . . ." (*id.* at 310), it would have been a disservice to the Courts and litigants which have relied on it to have inadvertently omitted references to this significant evidence-gathering machinery.

Thus, contrary to the assertion of petitioner, *Townsend, supra*, is not independent authority for the use of dis-



covery in habeas corpus proceedings; but actually describes a system which is inconsistent with the use of discovery.

The habeas corpus statute does not provide for discovery either directly under the Civil Rules or by analogy to the Rules, although it contains references to other provisions of the Federal Rules. See e.g., 28 U.S.C. 2242 (regarding amendment and supplements to applications). The statute also has created specific alternatives to formal discovery on habeas corpus.

The form of evidence to be used in habeas corpus proceedings is governed by 28 U.S.C. § 2246, which provides that on an application for a writ of habeas corpus "evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit." Nowhere does the statute permit depositions for discovery purposes. In *Sullivan v. United States*, 198 F. Supp. 624 (S.D.N.Y. 1961), Judge Murphy held that the omission of any reference to discovery from § 2246 prohibited its use in habeas corpus and refused to allow petitioner to serve written interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure, stating:

"The provision for deposition evidence in the first sentence of that statute relates, again, not to discovery depositions (which may be oral or by interrogatories) but to depositions intended to be used as testimonial evidence at a hearing upon the habeas corpus application. The deposition contemplated is that of a specified witness upon an open commission." *Id.* at 626.

Section 2246 is irrefutable evidence that Congress did not intend that the Federal Rules regarding discovery should apply in habeas corpus. If it were intended that the Federal Rules relating to discovery applied in habeas corpus there would have been no need to enact § 2246 in 1948 since the subject of that section, evidentiary depositions, had already been embodied in Rule 26 of the Federal Rules.

Congress has provided another alternative to discovery on habeas corpus by creating an independent affirmative duty of disclosure on the part of the respondent:

"On application for a writ of habeas corpus . . . , the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment . . . ." (28 U.S.C. § 2249.)

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding." (28 U.S.C. § 2254[e], [f].)

If the broad discovery provided by the Federal Rules of Civil Procedure directly applies to habeas corpus or applies as part of the Court's inherent power, there would have been no need for requiring respondent to produce those records. At the very least, some provision would have been made to prevent duplication of methods of production.

The importance placed upon a swift determination also indicates Congress' intent that habeas corpus proceed without the interruption of civil discovery. The habeas corpus timetable is as follows:

"The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." (28 U.S.C. § 2243)

Since the availability of the writ has been so dramatically expanded in recent years, good cause frequently is shown for a greater time for preparation for a habeas corpus hearing. Nonetheless when the statute was amended in 1966 (Pub. L. 89-711, November 2, 1966), the time limits of 28 U.S.C. § 2243 remained intact. They certainly are inconsistent with the use of discovery and indicate a strong public policy favoring a direct speedy and summary disposition of these cases. Finally, in the 1966 amendment to Section 2254, Congress detailed its requirement that evidence must be offered in a state court before application for habeas corpus is made, thus envisioning a situation in which discovery would be of very little practical value.

Both petitioner and the Legal Defense Fund seem to place principal reliance on their argument that petitioner could compel respondent to answer certain interrogatories because of the inherent power of the District Court in aid

of its jurisdiction. As has already been noted, there has been no such reliance in the instant case.

In any event, discovery is not a power of the Court. Federal Rules 26 through 37 govern the relationship of the parties to each other, defining their rights and duties to obtain and disclose information. The Rules do not deal with the right of the Court to compel production of evidence. Applications for discovery are served on the parties whose duty it is to formulate and define the issues by using this pre-trial procedure. The Court intervenes only when a dispute between them arises. Rules 30(d), 33, 37.

In habeas corpus cases, the traditional power of the Court is made explicit. The respondent is required to produce specific information. 28 U.S.C. § 2249, § 2254. The Judge has a duty to hear all relevant facts and make a determination based on them. *Townsend v. Sain, supra*. If these powers were not explicit, they might well be inherent to the essential judicial function of a District Court in habeas corpus.

If petitioner does not succeed in his reliance on the Federal Rules of Civil Procedure and thereby on the nominal designation of habeas corpus as a civil proceeding, there is no basis for the invocation of the Court's inherent power. The factual issues in such cases have previously been presented to a State criminal court. The federal discovery rules were not available to petitioner there, nor could he invoke them in a collateral civil proceeding in the State courts. In fact, the liberal discovery of the Civil Rules is not available even in federal criminal cases.

If, while presumed innocent, a defendant does not have these evidence-gathering tools, they certainly cannot first be utilized on collateral attack when the presumptions are against his claims. It would be as if there was very limited pre-trial discovery in civil cases, but wide-open discovery for the first time by way of a motion for a new trial. It would be a warped procedural system which encouraged

the withholding of claims and the continual rehashing of its previous cases.

Petitioner's argument would be more logical if he claimed inherent power to require full discovery in original criminal proceedings. However, the federal government has deliberately adopted a limited range of discovery in criminal matters. See Rule 16, Federal Rules of Criminal Procedure and notes of the Advisory Committee On Rules thereon. The procedure adopted for that limited discovery is not modeled on the Civil Rules. The parties must apply to the court for permission to inspect the documents for which discovery is available. Rule 16(f) specifies that all requests for discovery should be made promptly and in one motion.

Of course, legislation cannot deprive a court of the essence of its judicial power, that *sine qua non* without which a court cannot function, but District Courts may invoke this power only with relation to limited and traditional functions. *Michaelson v. United States*, 266 U. S. 42. This is not the inherent power to which petitioner refers. Petitioner uses "inherent power" as a convenient phrase for requesting this Court to legislate detailed rules of procedure for all habeas corpus cases in deciding this case in controversy. In *Miner v. Atlass*, 363 U. S. 641, on a claim directly analogous to that made in the instant case, this Court refused to hold that discovery under the Federal Rules of Civil Procedure was applicable to admiralty proceedings. A much stronger argument for the use of the Rules was made there, since the representatives of the deceased seaman were bringing an original action very much like a civil negligence case in which the Civil Rules would apply. Like plaintiffs in such actions, they might be deprived of access to much relevant information unless there was some way to compel disclosure by respondents. Yet this Court held:

"The problem . . . is one which peculiarly calls for exacting observance of the statutory procedures sur-



rounding the rule-making powers of the Court . . . designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Id.* at 650.

Petitioner's simplistic suggestion that discovery by the parties inheres in the District Court's jurisdiction would have obviated the need for the enactment of Rules 26 through 37 which has been hailed as one of the major accomplishments of the Federal Rules of Civil Procedure. *Hickman v. Taylor, supra* at 500. Petitioner's argument would hold that these rules are unnecessary surplusage, for broad discovery would be available without statutory authorization by reason of the inherent power of the Court. The implication is that future amendment would be a function of the individual District Courts over which the Legislature would have little control. Such an extension is obviously not contemplated and the argument for invocation of the inherent power of the District Court essentially is one for the desirability of discovery of some sort in habeas corpus proceedings (LDF Brief pp. 8, 20). Note, *Civil Discovery in Habeas Corpus*, 67 Colum. L. Rev. 1296, 1304 (1967). This is, of course, a matter for the Legislature.

This Court has a quasi-legislative function with regard to approving the Federal Rules. However, rules are not enacted by decisions of cases in controversy, but must be approved by Congress. 28 U.S.C. § 2072 (1964). Even this limited participation of the Court has been criticized as a violation of the doctrine of separation of powers. Members of this Court have found that procedural rules frequently create substantial rights the responsibility for which should reside in the legislative branch. 374 U.S. 865, 866-68 (Dissent of JJ. Black and Douglas to the Transmission of the Federal Rules of Civil Procedure).

Nonetheless, since this is a case of first impression, it should not be considered in a vacuum and we endeavor in Point II, *infra*, to discuss the policy considerations which would be presented to a legislative body which was deciding whether or not to provide procedures for discovery in federal habeas corpus.

## POINT II

**The unique and flexible hearing provided for habeas corpus cases is sufficient to provide full and fair disclosure of relevant facts without the superimposition of a discovery procedure neither designed nor appropriate for use in a summary proceeding.**

Petitioner's basic premise appears to be that the application of the discovery provisions of the Federal Rules of Civil Procedure to a habeas corpus proceeding is desirable in order to provide access to information not otherwise obtainable and, presumably, to provide that information more efficiently than existing procedures. This position rests on theories and abstractions which have no meaning once confronted with the real world of habeas corpus. Liberal discovery superimposed on the liberal habeas corpus procedure would not promote but would hinder the effectiveness of habeas corpus. The nature of the petition, of the inquiry, of the subject matter and of the relief are unique. Congress and the Courts, recognizing this, have designed procedures to implement the aims of habeas corpus. Far from assisting those ends, the discovery rules would, at best, provide the same information and, at worst, encumber and delay the disposition of claims. In habeas corpus, discovery procedures would be seriously abused and would result in intolerable harassment of potential witnesses.

The great volume of habeas corpus petitions creates two concomitant requirements—that non-meritorious claims be

culled out as early as possible and that meritorious claims be considered as swiftly and completely as possible. Typically, this process divides petitions into three categories. First, are those petitions which on their face are without merit or not ripe for federal adjudication, second, are those petitions which can be disposed of by reference to available state records, and third, are those petitions which require an evidentiary hearing.

Discovery rules are not useful in the first type of petition. Yet under their terms, they would be applicable (Rule 26). The second type of petition forms the bulk of habeas corpus applications. Those require resort to trial minutes, voir dire minutes, minutes of hearings on suppression of evidence, on voluntariness of confessions, on lawfulness of identifications, minutes of plea and sentence, motions to withdraw pleas, motions for change of venue, motions for new trial, grand jury minutes and the myriad records, notations, statements, documents and briefs relevant to a particular claim. All of these documents are available without discovery. 28 U.S.C. § 2249, § 2254. If unavailable because they are, for example, confidential, they would be unavailable through discovery rules.

It was for the third sort of case that this Court enunciated specific standards in *Townsend v. Sain, supra* at 317. The standards for a judge to follow and the duties which that opinion imposed upon him insure that every bit of relevant evidence which properly should be admitted in a habeas corpus proceeding will be introduced. If the District Judge fails in this duty, petitioner has a right to claim on appeal that he did not have a full and fair hearing as required in such cases. See *Townsend, supra*.

In appearing in virtually all of the habeas corpus cases before the federal courts in New York State, it has been the experience of this office that the District Judges take this mandate extremely seriously and require all relevant testimony and documents often before they decide on the sufficiency of a claim.

**A. Discovery Has Been Used in Habeas Corpus Only in Rare Instances and Its Absence Has Been no Impediment to Full and Fair Consideration of the Allegations of State Prisoners.**

Petitioner has made no showing that the absence of discovery has been detrimental to the rights of applicant Arthur Walker. Indeed, although there is no history of discovery having been widely used in habeas corpus cases (but see statement in LDF brief p. 27), no case has been cited which demonstrates that any petitioner has ever been deprived of essential information because of the unavailability of discovery.

In *Roberts v. Nelson*, October Term, 1967, No. 1407 Misc., a case pending on certiorari to another Ninth Circuit decision, the habeas corpus applicant sought the deposition of an important witness against him at trial. The Court held that these were evidentiary depositions and could be taken. It denied the applicant's allegation that the Federal Rules of Civil Procedure regarding discovery applied to habeas corpus. *Wilson v. Weigel*, 387 F. 2d 632 (9th Cir. 1967). Even though that case involves the special situation of a prisoner condemned to death, there was no showing that deposition before the hearing was warranted. The applicant makes an unsupported statement that the prosecutor coerced the testimony of this important witness. This same allegation was made at trial and the witness was thoroughly cross-examined. On the basis of the record before this Court there is no showing of the necessity of evidentiary depositions, let alone, discovery.

There are habeas corpus cases cited in petitioner's brief and that of the Legal Defense Fund which purportedly illustrate the use of discovery under the Federal Rules. *Fortner v. Balkcom*, 380 F. 2d 816, (5th Cir. 1967); *Molignaro v. Dutton*, 373 F. 2d 729 (5th Cir. 1967); *Rodgers v. Bennett*, 320 F. 2d 83 (8th Cir. 1963); *Sullivan v. Dick-*



son, 283 F. 2d 725 (9th Cir. 1960); *Schiebelhut v. United States*, 318 F. 2d 785 (6th Cir. 1963); *United States ex rel. Seals v. Wiman*, 304 F. 2d 53 (5th Cir. 1962); *Knowles v. Gladden*, 254 F. Supp. 643 (D. Ore. 1965), subsequent history in 378 F. 2d 761 (9th Cir. 1967); *Harris v. North Carolina*, 240 F. Supp. 985 (E.D.N.C. 1965); *Smith v. United States*, 174 F. Supp. 828 (S. D. Cal. 1959). Of these nine cases, it was respondent who sought discovery in six. *Fortner, supra*; *Molignaro, supra*; *Schiebelhut, supra*; *Knowles, supra*; *Harris, supra* and *Smith, supra*. In *Rodgers, supra* discovery had not been used. In remanding for a hearing the Circuit Court as dictum merely stated that discovery under the Civil Rules was available but there was no indication of the particular use to which it might be put. In *Sullivan v. Dickson, supra*, petitioner sought by means of a subpoena *duces tecum* the medical record of the complainant in one of his convictions for rape. The Court held that he could not examine those documents unless there was a pending proceeding. Although the Court suggested that if a hearing were granted he would be able to take depositions of the doctor who had possession of the documents, in any event, petitioner could call him as a witness and subpoena the documents.

In *Seals, supra*, petitioner claimed that there had been racial discrimination in the selection of the jury that convicted him in Mobile County, Alabama. Petitioner requested admissions of the State Attorney General with regard to facts already ascertained. Petitioner not only had relevant information, but he possessed exhibits attached to the request, which could have been introduced at a hearing.

In the Federal District Courts sitting in New York, it has been our experience that only one attempt to use discovery under the Civil Rules has been made. That occurred in a case which is presently pending before the United States District Court for the Southern District. *United States ex rel. Raymond Figueroa v. McMann* (File



68 Civ. 235 [S.D.N.Y. 1968]). Figueroa claims that his plea of guilty was coerced by the lack of effective assistance of counsel. Before ordering a hearing, the Court appointed counsel "to obtain competent affidavits from his [petitioner's] mother and his lawyer concerning the facts of the allegedly erroneous advice". Counsel's first step was to serve notices to take depositions of an Assistant District Attorney concerning the facts relating to the arrest, arraignment, plea and sentence and of an employee of the local probation department concerning petitioner's probation report. Laying aside the question of limitation by reason of the direction of the Judge, it is clear that the officials from whom depositions were sought could have been called as witnesses at a hearing if they had any relevant information. Furthermore, most of the significant details from official sources were already part of the record in the State Court proceeding.

In none of the foregoing cases, nor in any which has been brought to our attention has the petitioner been prevented from obtaining relevant evidence because of the unavailability of discovery under the Federal Rules of Civil Procedure.

In the instant case applicant Walker obviously wanted the information in order to investigate the version of the claims which he expected the police officer to make.\* However, there is no reason why he could not have put the

---

\* On the basis of the record in the instant case which does not include the minutes of trial, it is not clear to what extent the evidence sought from the Warden is different from that obtained on cross-examination of the police officer at Walker's trial. Even if the information is different, it is not clear why the officer was not so questioned at trial. Furthermore, it certainly is not clear that the allegedly new evidence presented by affidavit on the instant application had ever been presented to the state courts. However, because the propriety of holding the hearing is not before this Court, we assume that such evidence could be introduced, is relevant and if it is a surprise to Walker, he should have a chance to refute it.

officer on the stand at the hearing. If the testimony was such that an investigation was necessary, an application for an adjournment could have been made and would, no doubt, have been granted. In an ordinary case there would be relatively little loss of time by using this method.

As the Court below indicated, the Warden to whom the interrogatories were addressed did not have personal knowledge of the relevant events and thus the interrogatories were not evidentiary. *Wilson v. Harris*, 378 F. 2d 141, 144 n. 5. However, the applicant was well aware that the primary source of the information was the arresting officer, Sgt. T. Hilliard (App. 34-35). He was a necessary witness at the hearing whether or not discovery was allowed. Therefore, the question of obtaining sources of information by means of discovery is not raised in the instant case.

Although difficult to imagine, if such a case were to arise, the habeas hearing procedure is flexible enough to allow the Judge to require disclosure of the sources of relevant information. It is important to remember that a habeas corpus hearing is not before a jury nor does it have the evidentiary strictures of a trial before the Court. Therefore, tangential examination is possible and, in fact, not unusual.

The power of compulsory production of evidence at a habeas corpus hearing lies within the discretion of the Judge (28 U.S.C. § 2254; *Townsend, supra* at 318-19), while the responsibility for discovery is placed on the parties by the Federal Rules of Civil Procedure. The fact that the power and duty to compel evidence resides in the Judge insures the fastest possible production of relevant information, because when the proceedings begin the applicant almost universally is not represented by counsel. Furthermore, complete cooperation can be expected from respondent and other persons associated with the state prosecution both because of their duty under the statute and the re-

striction against suppression of evidence by the prosecution. *Brady v. Maryland*, 373 U. S. 83. Of course, the habeas applicant does have the right to subpoena and to take evidentiary depositions for use at any hearing.

Legal Defense Fund suggests that discovery may be useful to clarify the allegations of the *pro se* applicant (p. 13). Even apart from the delay which this would engender, discovery seems a round-about way to discover what an applicant means and discovery cannot be substituted for the jurisdictional requirement of factual allegations by the applicant. If the applicant is unrepresented by counsel, his own use of discovery would not help the situation. If the Court cannot understand the application, counsel may be appointed to clarify the claim. Certainly discovery will not help counsel determine what the claim is. The appointment of counsel for clarification was done in the instant case and was the purpose of the appointment in the *Figueroa* case, *supra*.

Of course, discovery is a tool of both the defendant and the plaintiff. It usually is a much more important tool for the defendant. See *Fortner, supra*; *Molignaro, supra*; *Schiebelhut, supra*; *Knowles, supra*; *Smith, supra*. The Federal Rules of Civil Procedure themselves make some distinction between the parties. Rule 26(a) provides that a defendant may take depositions without leave of the Court within twenty days after the commencement of the action while the plaintiff must seek leave of the Court in order to serve depositions within that period. The Advisory Committee in its notes on that rule stated that this section "... protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection."

The only unknown fact in a habeas corpus application usually is the state prisoner's own version of the denial of his rights. Usually unrepresented by counsel the state-

ments often need clarification before the state can respond. Also while the state had to go forward to prove the prisoner's guilt, his version of the underlying facts has often not been on the record. Finally, it has been our experience that many claims are lightly and even perjurally made. Therefore, it is true that discovery would be particularly useful to respondent to fully explore petitioner's factual claims and the context in which they were made. However more efficient, direct and expeditious methods would accomplish the same purpose. Whatever the needs of respondent, neither the argument of, nor the cases cited by, petitioner demonstrate that discovery is a useful tool for habeas corpus applicants.

**B. The Statutory Purposes for Which Discovery Was Designed Are Not Relevant to the Flexible Summary Habeas Corpus Proceeding.**

The briefs of both petitioner and the Legal Defense Fund, as well as the commentators on which they rely (petitioner's brief p. 24, LDF brief pp. 16-17), recognize that even if discovery were applied to habeas corpus it would operate differently from the way it operates in civil proceedings. However, any proposed change envisions statutory amendment rather than the application of the existing law.

Perhaps the most frequently suggested change is that discovery ought not to be allowed until after a hearing has been ordered. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies, Tentative Draft, Jan. 1967, pp. 68-71. Hon. James M. Carter, *Pre-Trial Suggestions for Section 2255 Cases*, 32 F.R.D. 393, 396-7 (1963).

Certainly to this extent the authorities are correct. It would create an unnecessary burden on the District Court and respondent if discovery were available before the Court had determined whether the contentions have merit and/or

are ripe for consideration. In that event, discovery would be of no use on motions for summary judgment which is one of its primary advantages in ordinary civil litigation. 4 Moore's Federal Practice, *supra* ¶ 26.02 [4] at p. 1040. While there is no motion for summary judgment in habeas corpus the Court's decision whether or not to hold a hearing serves an analogous function.

The basic function of discovery is the formulation and narrowing of issues for trial. *Hickman v. Taylor, supra*, at 501. However issue formulation is of much less significance in habeas corpus proceedings than in ordinary civil litigation. The relationship of the parties refers to a specific conviction in a specific court and claims are made in the context of a finite number of well known constitutional claims. Moreover the District Judge has a peculiar role in formulating those issues. His initial decision on whether or not to hold a hearing performs that function, rather than its being performed by the adversary parties as in ordinary civil litigation.

The great pragmatic benefit of the discovery procedure in civil cases has been to limit the number of witnesses at trial, decrease the length and number of proceedings which take court time and, in fact, to settle many cases out of court. These advantages would not accrue at all in habeas corpus proceedings.

Needless to say, settlement is not a feasible objective of a habeas corpus case. The issues on habeas corpus are already limited and the necessity of taking testimony is reduced by the likelihood of prior procedures in the state courts. Furthermore, the Judge must hear all relevant evidence. Thus, discovery would tend merely to duplicate testimony that would have to be introduced at a hearing in any case.

In addition to the waste of time that this would involve, it also would impose an unfair burden on witnesses. Let us take, for example, Mae Coleman, the witness whose dep-



osition was sought in *Roberts v. Nelson, supra*. At the time of the murder, undoubtedly she was interviewed several times by police officers, she may well have testified before a Grand Jury, she was examined and cross-examined at great length during trial, in such a case she might have testified in a state habeas corpus proceeding, and she will have to testify at the federal habeas corpus proceeding. This can be an excessive burden on a private citizen, a judge, a District Attorney, a former official or even a victim of painful crime. Worst of all, this burden would serve no useful purpose. Because evidence will have to be repeated at a habeas corpus hearing, there is no distinct advantage to having it presented outside the hearing of the court which has the duty to discover all relevant facts.

Another objective in creating the federal discovery rules was to reduce the importance of gamesmanship in trials. *Hickman v. Taylor, supra*, at 501, *United States v. Proctor & Gamble Co.*, 356 U. S. 677, 682. This was an outgrowth of the adversary nature of civil litigation. There never has been a sporting theory in habeas corpus. There is no statute of limitations and no *res judicata* rule. There are few formal requirements for pleadings and there are flexible standards for holding flexible hearings and an extraordinary limited waiver rule. The very essence of the "game" is eliminated with the abolition of definite procedural rules.

Habeas corpus proceedings are not in the control of adversary parties to the extent that civil litigation is. Indeed, in many ways, the parties are not true adversaries. Attorneys for the respondent Wardens have quasi-prosecutorial functions and thereby inherit a constitutional duty to disclose information which would aid petitioners. In addition, there are the statutory requirements of disclosure discussed above. Actually, the essential function of discovery is to create a duty of disclosure of evidence in the other party, because without such a statutory duty his

natural adversarial interest would be to keep such evidence hidden. In habeas corpus, the respondent already has that duty. Habeas corpus petitioners thus would gain no substantial benefit from the availability of discovery.

The preservation of testimony which might be lost if a witness were to become unavailable or were his memory to fade is another advantage gained from the use of discovery under the Rules. This important function serves only if the delay before the hearing or trial is substantial. Such a delay would be entirely inappropriate and unlikely in a habeas corpus case (28 U.S.C. § 2243). In many such cases, the witness' testimony is already preserved. Furthermore, preserving a witness' memory is only possible if discovery occurs at a time proximate to the primary events which are the subject of his testimony. This is not the case on habeas corpus, since applications are brought after the judgment of conviction becomes final. Since there is no statute of limitations, it is likely that the application for habeas corpus is made long after the state proceedings and certainly long after the underlying criminal occurrence.

With respect to the use of discovery procedures, habeas corpus is functionally more like an appeal than an original criminal action. *Wilson v. Harris, supra*. Rule 27(b) of the Federal Rules of Procedure makes specific reference to the use of discovery pending appeal, limiting it to depositions taken for the purpose of perpetuating testimony. See *Richter v. Union Trust Co.*, 115 U.S. 55. This is the use to which discovery was limited in habeas corpus by the Ninth Circuit in *Wilson v. Weigel, supra*.

**C. The Factors Which Limit the Abuse of the  
Discovery Rules by Civil Litigants Would be  
Ineffective in Habeas Corpus Cases.**

Discovery gives the parties a great deal of power which might be used for harassing an adversary. There are in-

stances of its being used to that end. Note, *Tactical Use Of And Abuse Of Depositions Under The Federal Rules*, 59 Yale Law Journal 117ff. (1949). However, that power is probably not used to annoy very frequently because there is little advantage to be gained. The parties seeking discovery pay most of the costs. It has been noted that inequality of resources among parties to civil litigation has led to abuse by the party to whom the costs are negligible as against those who are less well off, 59 Yale Law Journal, *supra* at 127-31.

Nonetheless, litigation of all sorts may give rise to an irrational desire to burden and persecute one's adversary, without regard to the expense. However, counsel usually is able to provide a cool head and restraining hand in order that parties act rationally in their own interest. In other words, the greatest deterrence against abuse is rationality on the part of the parties.

Neither of these limiting factors would offer much hope of controlling abuse of the discovery power in habeas corpus. Costs would not be a deterrent for the paradoxical reason that the overwhelming majority of prisoners, if for no other reason than their imprisonment, are indigent and the federal government would be expected to bear the costs. Even when a prisoner is represented by counsel in such a case, the relationship between the party and his attorney is such that counsel has less tactical control than in the ordinary civil litigation contemplated by the Committee on Rules, since many prisoners consider themselves well-versed in the law. Counsel does not have a financial interest in the outcome of the case and, indeed, he has not been personally hired by the petitioner in many cases. While petitioners frequently ask that they be represented by a different lawyer, assigned counsel are loath to ask that they be relieved even though the petitioners will not follow their advice in planning the course of litigation. Furthermore, petitioners frequently make motions and file

briefs which supplement the action of counsel. Therefore, the control by counsel is very little deterrence against the abuse of discovery in habeas corpus. A *pro se* petitioner, undeterred by counsel or the threat of costs, would be tempted to serve demands on all persons, public and private, with whom he has crossed paths or swords.

The greatest potential for the abuse of discovery in habeas corpus is the love of litigation for its own sake with which many prisoners are afflicted. Many commentators have remarked with amazement on this joy in adjudication. See e.g., *Diggs v. Welch*, 148 F. 2d 667, 669-70 (D. C. Cir. 1945); Carter, *Pre-trial Suggestions*, *supra*. It cannot be ignored in considering whether or not to allow discovery to parties in habeas corpus proceedings. It is understandable that an incarcerated person would be delighted by the prospect of requiring persons in authority to answer his questions and do his bidding, but this understandable predilection has already overwhelmed the District Courts. While in some respects the burgeoning of litigation is an unavoidable concomitant of providing a remedy for extraordinary abuse, it certainly is a factor to be considered before altering habeas corpus procedures. If discovery were essential to enable habeas corpus petitioners to vindicate their constitutional rights, the potential burden it would impose would diminish in importance, but when we consider the efficacy of using such a procedure, its susceptibility to abuse in a particular kind of action, is very significant.

It is no answer to the probability of abuse that protective orders could be obtained in order to prevent excessive examination (Rule 30[b] Federal Rules of Civil Procedure) for the burden is on respondent affirmatively to seek such protective orders. The burden on independent persons, possibly unrepresented by counsel, could be very disturbing. Finally, the tendency of Courts is to be skeptical about granting protective orders in light of the broad

purposes of discovery under the federal rules. 4 *Moore's Federal Practice, supra*, ¶ 30.06 at pp. 2044-48. It is interesting to note that in the *Report On Standards Relating To Post-Conviction Remedies* of the American Bar Association Project On Minimum Standards For Criminal Justice, *supra*, the discovery rule proposed requires that the discovery be made only with court authorization and subject to an affirmative showing of good cause by the parties seeking discovery. *Id.* at page 68. Certainly the obtaining of such orders would further burden and delay the proceeding.

At the very least, the substantial threat of abusive discovery procedures in habeas corpus proceedings mandates this kind of careful legislative consideration of discovery rules particularly applicable to such a proceeding if such legislative investigation reveals a necessity for their use at all.

The purpose of habeas corpus is to relieve unjust imprisonment. *Fay v. Noia, supra* at 402. The writ is, by definition, an extraordinary one and it must be processed with great speed. Congress has made the requirement of speed explicit. 28 U.S.C. § 2243. Even its heartiest supporters admit that discovery has created delay in disposing of the civil cases in which it is available. See e.g., 60 *Yale Law Journal* 1133, 1155, *The Use Of Discovery In United States District Courts*, Speck, William H. .

In formulating the limited discovery in federal criminal cases, the Advisory Committee on Rules deliberately sought to prevent the delay ordinarily associated with discovery. Rule 16(F), Federal Rules of Criminal Procedure.

"This subdivision is designed to encourage promptness in making discovery motions and to give the Court sufficient control to prevent unnecessary delay and court time consequent upon a multiplication of



discovery motions. Normally one motion should encompass all relief sought and a subsequent motion permitted only upon a showing of cause." *Id.* Notes of Advisory Committee.

The instant case presents an excellent example of the unnecessary time consumed by using discovery in habeas corpus cases. Counsel was appointed to represent Walker on March 16, 1966 in an order which indicated that a hearing might be necessary. On August 4, 1966 counsel moved for an order granting an evidentiary hearing and for a pre-trial conference. (App. 1, 8-32). On August 16, 1966, the Court granted the motion setting September 1 as the date for the pre-trial conference (App. 1, 33). Thereafter, the date of the hearing was set for October 28, 1966. On October 20, 1966, Walker's counsel served a set of interrogatories upon the respondent Warden (App. 1, 34-35). The next day respondent filed its objections thereto (App. 1, 36-38). That same day the Court denied the objections and ordered the interrogatories answered by October 26, 1968 (App. 1, 39). As of August 16, 1966 Walker had a right to an expeditious hearing on the merits of his claim. Any delay would be a deprivation of his freedom according to his own contentions. Yet he applied for a pre-trial conference, claiming that the issues to be heard were complex (App. 25), although on its face, it appears to be a limited contention which does not suggest the necessity of many witnesses—that the arresting officer proceeded on information from an informer not known to be reliable (App. 13). Nonetheless, the pre-trial conference was ordered.\*

---

\* The question of whether or not a pre-trial conference under Rule 16 of the Federal Rules of Civil Procedure is available in habeas corpus is not presented by this case and we do not take any position on this question. Under the flexible habeas corpus procedure, it is beyond doubt that the Court can discuss the scope of a hearing with the parties or their counsel before it is held.

In civil cases, the use of discovery frequently precedes pre-trial conferences and assists in limiting the issues as defined in the pre-trial order. This would not necessarily be a salutary function in habeas corpus since such limitation would probably not be considered a "waiver" of future claims under the standards of *Fay v. Noia*, *supra* at 439. Thus, it could become a source of future objection to the nature of the habeas corpus hearing. Furthermore, a full adjudication of all federal claims on a petitioner's first application for habeas corpus relief has been mandated by Congress in its 1966 Amendment to the habeas corpus statute. 28 U.S.C. § 2253. That mandate requires that the first hearing be flexible in scope. While we acknowledge its benefits to ordinary civil litigation, the pre-trial conference certainly could be a procedural block to a speedy hearing in habeas corpus cases.

The instant case is an illustration. The hearing, instead of the pre-trial conference, could have been held on September 1.

The interrogatories in this case were served after the pre-trial conference and thus could not be used in that context. In any event, the hearing itself was set for October 28, 1966 and the first attempted use of discovery occurred merely seven days before, on October 21, 1966 (App. 1, 34-35). Respondent was ordered to answer the interrogatories two days before the hearing was to be held. Thus, it was for 1½ days of investigation that Walker resorted to discovery. Perhaps he would have had to apply for an adjournment to pursue the information received. Certainly it would have been more direct, efficient and expeditious to have scheduled an earlier hearing, had full examination and cross-examination of the arresting officer himself and then to have requested an adjournment and further cross-examination, if necessary.

We mean to impute no ulterior motive or purposeful delay to Walker or his counsel. We use this case solely to

demonstrate that the automatic application of the Federal Rules regarding discovery in habeas corpus cases results in delay in the adjudication of those cases and affords petitioners nothing that they would not be entitled to under the flexible procedures already in use in habeas corpus.

Of course, the instant case is not illustrative of the extreme procedural blockage which the availability of discovery under Rules might entail. The number of interrogatories and depositions is unlimited. Protective orders, orders to terminate or limit examination on each might be necessary. An excellent discussion of the kind of delay that can occur by reason of the use of discovery under the Rules is contained in the note at 59 Yale Law Journal 117ff. While the kind of purposeful delay which has sometimes occurred in civil litigation might not seem to be a rational tactic for a habeas corpus petitioner, if petitioners were given the opportunity to serve orders, get answers and even have protective motions made against them, many prisoners would enter the fray joyously. Contrary to the inherent deterrence which operates in ordinary civil litigation, the complicated procedures of discovery might be an attraction in and of themselves.

# CONCLUSION

For the foregoing reasons and those presented by attorney for respondent, the California Attorney General, the decision of the Court below should be affirmed.

Dated: New York, New York, October 31, 1968

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
*Attorney for Amicus Curiae*

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

AMY JUVILER  
JOEL H. SACHS  
Assistant Attorneys General,  
*of Counsel.*

**LIBRARY**  
**SUPREME COURT, U. S.**

Office-Supreme Court, U.S.  
**FILED**

**DEC 9 1968**

**JOHN F. DAVIS, CLERK**

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1968**

**No. 199**

---

**GEORGE B. HARRIS**, Judge of the United States District Court  
for the Northern District of California,

*Petitioner,*

*vs.*

**LOUIS NELSON**, Warden,

*Respondent.*

---

**REPLY BRIEF FOR PETITIONER**

---

**J. STANLEY POTTINGER**  
425 California Street  
San Francisco, California 94104

**J. THOMAS ROSCH**  
601 California Street  
San Francisco, California 94108

*Attorneys for Petitioner*



# INDEX

## SUBJECT INDEX

	Page
Opinion Below .....	1
Jurisdiction .....	1
Statutes and Rules Involved .....	1
Question Presented .....	2
Argument .....	2
I. Petitioner Has Not Raised Any Question Which Was Not Raised in the Court of Appeals or the Petition for Certiorari (Resp. Brief, pp. 14-17) .....	2
II. Authorization for Discovery Interrogatories Is Provided in the Habeas Corpus Statutory Scheme, in Section 2243 in Particular, and in the Authority of <i>Brown v. Allen</i> and <i>Townsend v. Sain</i> (Resp. Brief, pp. 18-31) .....	8
(A) Section 2246 of the Habeas Corpus Act Does Not Expressly or Implicitly Deal With Discovery Interrogatories, and Thus Does Not Prohibit Their Use (Resp. Brief, pp. 19-22) .....	9
(B) Congressional Authorization for Discovery in Habeas Corpus Proceedings Presently Exists (Resp. Brief, pp. 22-23, 30-31) .....	10
(C) The Decisions of This Court Provide the District Courts With the Authority to Use Discovery Interrogatories in Habeas Corpus Proceedings (Resp. Brief, pp. 24, 25) .....	11

	Page
(D) Discovery Is Essential to the Fact-Finding Process, and Will Not Burden the Parties or Defeat the Summary Provisions of the Habeas Corpus Act (Resp. Brief, pp. 25-30) .....	12
III. The District Court Has the Inherent Power to Authorize Discovery Interrogatories in a Habeas Corpus Proceeding (Resp. Brief, pp. 31-39) .....	26
IV. The "All Writs" Statute Provides a District Court With a Basis for Authorizing Discovery Interrogatories in a Habeas Corpus Proceeding (Resp. Brief, pp. 39-47) ..	30
V. The Discovery Interrogatory Provisions of the Federal Rules of Civil Procedure Apply to Habeas Corpus Proceedings (Resp. Brief, pp. 48-73) .....	32
(A) Respondent Is Incorrect in Arguing That the Civil Rules Are Totally Inapplicable to Habeas Corpus (Resp. Brief, pp. 52-58) .....	33
(B) Respondent Is Incorrect in Arguing That Rule 33 Does Not Conform to the Requirements of Rule 81(a)(2) (Resp. Brief, pp. 59-73) .....	37
Conclusion .....	44

#### TABLE OF CASES

<i>Abel v. Tinsley</i> , 338 F.2d 514 (10th Cir. 1964) ..	40
<i>Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.</i> , 249 U.S. 134 (1919) .....	26
<i>Bankers Util. Co. v. David H. Zell, Inc.</i> , 15 F. Supp. 1072 (S.D.N.Y. 1936) .....	43

# INDEX

iii

	Page
<i>Bethlehem Shipbuilding Corp. v. N.L.R.B.</i> , 120 F.2d 126 (1st Cir. 1941) .....	31
<i>Bowdidge v. Lehman</i> , 252 F.2d 366 (6th Cir. 1958) .....	40
<i>Brown v. Allen</i> , 344 U.S. 443 (1953) .....	2, 7, 8, 11, 12, 14, 29, 31, 32
<i>Cary v. Curtis</i> , 44 U.S. (3 How.) 236 (1845) .....	27, 28
<i>Cleminshaw v. Beech Aircraft Corp.</i> , 21 FRD 300 (D.Del. 1957) .....	43
<i>Duignan v. United States</i> , 274 U.S. 195 (1927) ....	5
<i>Ex Parte Peterson</i> , 253 U.S. 300 (1920) .....	26, 27, 28, 29
<i>Ex Parte United States</i> , 101 F.2d 870 (7th Cir. 1939) .....	26
<i>General Electric Co. v. Independent Lamp &amp; Wire Co.</i> , 244 Fed. 825 (D.N.J. 1915) .....	43
<i>Harris v. Nelson</i> , 378 F.2d 141 (9th Cir. 1967) ..	1.
<i>Helvering v. Gowran</i> , 302 U.S. 238 (1937) .....	7
<i>Hickman v. Taylor</i> , 329 U.S. 495 (1947) .....	13, 14, 20
<i>Holiday v. Johnston</i> , 313 U.S. 342 (1941) .....	32, 37
<i>Hunter v. Thomas</i> , 173 F.2d 810 (10th Cir. 1949) ..	40
<i>Irvine v. California</i> , 347 U.S. 128 (1954) .....	5
<i>J. E. Riley Invest. Co. v. Comm'r</i> , 311 U.S. 55 (1940) .....	7
<i>Lawn v. United States</i> , 355 U.S. 339 (1958) .....	5
<i>Local 1976, U.B.C.&amp;J. v. NLRB</i> , 357 U.S. 93 (1958) .....	5
<i>Mahler v. Eby</i> , 264 U.S. 32 (1924) .....	7
<i>Miner v. Atlass</i> , 363 U.S. 641 (1960) .....	11, 28, 31, 41
<i>Namet v. United States</i> , 373 U.S. 179 (1963) .....	5
<i>Neely v. Ebing Constr. Co.</i> , 386 U.S. 317 (1967) ..	5
<i>Olson Rug Co. v. N.L.R.B.</i> , 291 F.2d 655 (7th Cir. 1961) .....	31

	Page
<i>Perkins Oil Well Cementing Co. v. Owen</i> , 293 Fed. 759 (S.D. Cal. 1923) .....	43
<i>Phillips Chem. Co. v. Dumas Independent School Dist.</i> , 361 U.S. 376 (1960) .....	5
<i>Price v. Johnston</i> , 334 U.S. 266 (1948) .....	30, 31
<i>Quirk v. Quirk</i> , 259 Fed. 597 (S.D. Cal. 1919) ..	43
<i>Reflor v. Lansing Dropforge Co.</i> , 124 F.2d 440 (6th Cir. 1942) .....	26
<i>Reid v. Prentice-Hall</i> , 261 F.2d 700 (6th Cir. 1958) .....	26
<i>Sibbach v. Wilson &amp; Co.</i> , 312 U.S. 1 (1941) .....	7
<i>Tiberg v. Warren</i> , 192 Fed. 458 (9th Cir. 1911) ....	40
<i>Townsend v. Sain</i> , 372 U.S. 293 (1963) 2, 8, 11, 12, 14, 29	
<i>United Bhd., C. J. v. United States</i> , 330 U.S. 395 (1947) .....	7
<i>United States ex rel. Jelic v. District Director of Immigration</i> , 106 F.2d 14 (2d Cir. 1939) ..	35
<i>United States ex rel. Seals v. Wiman</i> , 304 F.2d 53 (5th Cir. 1962) .....	40
<i>Walker v. Johnston</i> , 312 U.S. 275 (1941) .....	32

TABLE OF ARTICLES AND TREATISES

ABA, PROCEEDINGS OF THE INSTITUTE ON THE "FEDERAL RULES OF CIVIL PROCEDURE AT WASHINGTON, D.C., AND OF THE SYMPOSIUM AT NEW YORK CITY (1938) .....	35
J. High, <i>Extraordinary Legal Remedies</i> (3rd Ed. 1896) .....	3
Louisell, "The Theory of Criminal Discovery and the Practice of Criminal Law", 14 Vand. L. Rev. 921 (1961) .....	25
Moore and Garfinkel, 4 <i>Moore's Federal Practice</i> (2nd ed. 1966) .....	13, 19, 21, 42
Note, "Civil Discovery in Habeas Corpus", 67 Colum. L. Rev. 1296 (1967) .....	25

Pike and Willis, "Federal Discovery in Operation", 7 Univ. of Chicago L. Rev. 297, 303 (19 ) .....	21
Ragland, <i>Discovery Before Trial</i> (1932) .....	19
2 T. Spelling, <i>Extraordinary Relief</i> (1893) .....	3
Sunderland, "Theory and Practice of Pretrial Procedure", 36 Mich. L. Rev. 215, 867-869 n. 2 (1937) .....	19

TABLE OF LEGISLATIVE HISTORY

<i>Advisory Comm. on Rules for Civil Procedure, Preliminary Draft 3 as Revised, draft Rule 90</i> (a) (Feb. 20, 1937) .....	33
---	----

TABLE OF STATUTES AND RULES

28 U.S.C. §1254(a) .....	1
28 U.S.C. §1651(a) .....	2, 4, 11, 30, 31
28 U.S.C. §1915 .....	22
28 U.S.C. §2242 .....	13, 14, 38
28 U.S.C. §2243 .....	2, 8, 9, 11, 14, 22, 24, 25
28 U.S.C. §2246 .....	9, 10, 11, 29, 32, 38
42 U.S.C. §1983 et seq. ....	24
Equity Rule 58 .....	38, 41, 42, 43
<b>Fed. R. Civ. P.</b>	
Rule 26 .....	22, 23
Rule 30 .....	21, 23, 24
Rule 33 .....	10, 22, 23, 27, 43, 44
Rule 53 .....	36, 37
Rule 59 .....	40
Rule 81(a)(1) .....	28-29
Rule 81(a)(2) .....	33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44
<b>Fed. R. Crim. P.</b>	
Rule 54(b)(5) .....	32, 36
<b>U.S. Sup. Ct. Rules</b>	
Rule 23(1)(c) .....	3



**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1968**

**No. 199**

---

**GEORGE B. HARRIS, Judge of the United States District Court  
for the Northern District of California,**

*Petitioner,*

*vs.*

**LOUIS NELSON, Warden,**

*Respondent.*

---

**REPLY BRIEF FOR PETITIONER**

---

**Opinion Below**

The opinion of the Court of Appeals is reported at  
378 F.2d 141. (A. 40)

**Jurisdiction**

This Court has jurisdiction under 28 U.S.C. §1254(a),  
having issued a writ of certiorari to the United States  
Court of Appeals for the Ninth Circuit in this matter on  
June 17, 1968.

**Statutes and Rules Involved**

See Brief for Petitioner, pp. 2-4.

## Question Presented

Is a United States district court judge without jurisdiction to order discovery by way of written interrogatories in habeas corpus proceedings?

## ARGUMENT

In the interests of clarity, Petitioner will reply to Respondent's arguments in the order in which they appear in Respondent's brief (hereafter "Resp. Brief").

### I.

**Petitioner Has Not Raised Any Question Which Was Not Raised in the Court of Appeals or the Petition for Certiorari. (Resp. Brief, pp. 14-17)**

Respondent criticizes Petitioner's citation of 28 U.S.C. §2243 and this Court's decisions in *Brown v. Allen*, 344 U.S. 443 (1953) and *Townsend v. Sain*, 372 U.S. 293 (1963); of certain federal cases concerned with powers of the district courts inherent in their duty to effect the ends of justice; and of 28 U.S.C. §1651(a) (the All Writs Statute) as raising "questions" and "issues" not raised before the Court of Appeals below or in Petitioner's certiorari petition.

The *only* "issue" or "question" raised and discussed in Petitioner's opening brief (hereafter "Pet. Brief") is set forth at page 4 of that brief: "Is a United States district court judge without jurisdiction to order discovery by way of written interrogatories in habeas corpus proceedings?"

This was precisely the question raised in the Court of Appeals by Respondent's application for a writ of prohibition (R. 1)<sup>1</sup>—a writ which could issue only if Judge Harris was without any jurisdiction to make the order which he made. (A. 39); 2 T. Spelling, *Extraordinary Relief*, 1396 (1893); J. High, *Extraordinary Legal Remedies*, 705-6 (3rd Ed. 1896). It is *verbatim* the question presented to this Court in Petitioner's certiorari petition. And it is almost identical in language and certainly identical in substance to the question which is raised and discussed in Respondent's brief. (Resp. Brief, p. 2)

To the extent that Petitioner's authorities can be said to raise any different "question" at all it would simply be the more specific "question" of whether the District Court's jurisdiction could be founded upon anything besides the Federal Rules of Civil Procedure. This "question" is manifestly a "subsidiary question fairly comprised in" the more general question as to whether such jurisdiction existed at all. As such, it did not need to be separately set forth in the certiorari petition (Rule 23(1)(c), U.S. Sup.Ct. Rules). The fact is, however, that the question of whether the District Court's order could be sustained on grounds other than the Federal Rules of Civil Procedure was set forth and discussed explicitly in the Court of Appeals below by both Respondent and Petitioner. Respondent's (Petitioner below) own supplemental brief in the Circuit Court is divided into two arguments: first, that the Federal Rules of Civil Procedure do not apply to habeas

---

<sup>1</sup> Respondent also erroneously applied for a writ of mandamus in the alternative—erroneously because Respondent sought a negative command while mandamus must be positive in its commands. See 2 T. Spelling, *Extraordinary Relief*, 1396 (1893).

corpus, and second, that *no other authority* supports the use of discovery in habeas corpus.<sup>2</sup>

Thus, even if Respondent were correct (which he is not) in arguing that new authorities cannot be raised on appeal, Respondent's own sweeping discussion of "all authorities" other than the Federal Rules of Civil Procedure makes the argument academic in this case.

Nor did Petitioner confine himself to a discussion of the Federal Rules of Civil Procedure in the Court of Appeals. He specifically discussed the power of the District Court inherent in its duty to do justice in Walker's case (see Supplemental Brief for Respondent below, pp. 4-8 [R. 29]), and all of the authorities about which Respondent complains in this First section may be considered statutory and decisional expressions of that power. Petitioner cited those very same authorities (except the All Writs Statute) in his certiorari petition. Thus, Petitioner has raised no questions or issues which he did not raise in the Court of Appeals below and in the certiorari petition.

---

<sup>2</sup> The State's brief reads in part as follows:

**"II. FEDERAL PRACTICE DOES NOT PERMIT DISCOVERY IN HABEAS CORPUS PROCEEDINGS.**

The exact federal practice in regard to procedure in habeas corpus cases is not clear. *Examination of all authorities on the subject has failed to disclose any case wherein discovery has been allowed in habeas corpus* (with the exception of the recent, and erroneous, *Gladden* and *Schiebelhut* cases, both of which relied on the Federal Rules). The silence of *all authorities* would suggest that it is not the practice, and never has been the practice, to allow discovery in habeas corpus proceedings." (Emphasis added.) (Supplemental Brief for Petitioner [Respondent herein] p. 10) (R. 29)

Petitioner has cited to this Court authorities not cited in the Court of Appeals and, in the instance of the All Writs Statute, not cited in the certiorari petition, in response to Respondent's argument, repeated in his brief (pp. 32-33), that a federal district court judge sitting in habeas corpus has no powers besides those flowing from federal statutes. But there is nothing in this Court's rules or decisions which suggest that the Court is or should be limited in deciding the cases before it to the *authorities* advanced in the Courts of Appeals or the certiorari petition. Certainly the cases cited by Respondent do not support such a proposition. They simply hold that the Court will ordinarily decline to consider an attack on a trial court ruling or order where that ruling or order had not been attacked in the Court of Appeals, *Lawn v. United States*, 355 U.S. 339 (1958); *Duignan v. United States*, 274 U.S. 195 (1927) or in the certiorari petition, *Lawn v. United States*, *supra*; *Irvine v. California*, 347 U.S. 128 (1954) and will ordinarily decline to consider an attack on a Court of Appeals determination not attacked in the certiorari petition. *Namet v. United States*, 373 U.S. 179 (1963); *Phillips Chem. Co. v. Dumas Independent School Dist.*, 361 U.S. 376 (1960); *Local 1976, U.B.C.&J. v. NLRB*, 357 U.S. 93 (1958); *Neely v. Ebing Constr. Co.*, 386 U.S. 317 (1967). They have no application where, as here, the proceedings in both this Court and the Court of Appeals have been concerned with only one trial court order (the order compelling Respondent to answer discovery interrogatories) and where, as here, the *only* determination of the Court of Appeals which Petitioner attacks is the one he stated in his certiorari petition that he would attack (the determination that the trial court was without jurisdiction to make such an order).



Respondent has informed Petitioner that in a forthcoming supplemental brief Respondent will concede that he was in error in contending that inherent power authori-

---

\* The State's forthcoming supplemental brief stems from its erroneous assertion that inherent powers authorities were not raised below. The State's first error occurred in its certiorari response where it stated that the inherent power "issue" "was not broached by either party" in the Court of Appeals. (Resp. Cert. Brief, p. 25). Petitioner replied to this error in a certiorari reply memorandum, filed April 10, 1968, attaching copies of those pages of his Appellate Court brief in which inherent powers authorities were set forth. After certiorari was granted, however, the State asserted once again in its brief that no authorities other than the Federal Rules of Civil Procedure had been cited to the Circuit Court below.

Counsel for Petitioner called the error to the attention of the State's counsel and shortly thereafter received a copy of a letter written by the State and addressed (but not, it was later revealed, mailed) to the Clerk of the Court which stated that Petitioner "did indeed claim that the District Court had 'inherent power' to order discovery", and that "insofar as that single issue is concerned, then, we concede that it was raised in the Court of Appeal."

Still later, however, counsel for Petitioner was asked by the State to disregard this letter, and instead was sent a copy of a second letter also written by the State and sent to the Clerk of the Court. In this second letter, the State conceded that inherent powers authorities were raised in the Court of Appeal, but contended that they should now be disregarded because "the District Court did not purport to invoke it in issuing its order."

The State next informed counsel for Petitioner that the information set forth in this second letter will be presented in a supplemental brief. It is in reliance on the second letter, then, that Petitioner replies above to what he is told will appear in the new brief.

Finally, the State contends that it did not receive a copy of Petitioner's certiorari reply memorandum, in which the State's first error was pointed out. A copy of this reply memorandum was served by mail upon the State as attested by counsel's affidavit of service attached thereto. Whether the State received it, however is largely immaterial on this point since the appellate briefs containing the discussions of authorities other than the Federal Rules of Civil Procedure are a part of the certified record and have long been in the State's possession.

ties were not raised below, but will argue that such authorities should now be disregarded because the District Court allegedly did not purport to invoke such power in issuing its order.

The District Court's order, however, did not purport either to invoke or limit itself to *any* particular jurisdictional authority—inherent power, the Federal Rules of Civil Procedure, or any other. By its own terms, the order may be sustained on any valid jurisdictional ground. Furthermore, even if the order had been based expressly on one theory or another, it is well established that the parties are not limited on appeal to the same reasons or arguments relied on by the court below. *Brown v. Allen*, 344 U.S. 443, 459 (1953); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); see also *J. E. Riley Invest. Co. v. Comm'r*, 311 U.S. 55, 59 (1940). Moreover, *even if* these authorities had not been raised below, and *even if* they were deemed to constitute separate “issues” rather than theories, this Court has held that it may consider issues not raised below. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941); *Mahler v. Eby*, 264 U.S. 32, 45 (1924); *United Bhd., C.J. v. United States*, 330 U.S. 395, 412 (1947).

## II.

**Authorization for Discovery Interrogatories Is Provided in the Habeas Corpus Statutory Scheme, in Section 2243 in Particular, and in the Authority of *Brown v. Allen* and *Townsend v. Sain*. (Resp. Brief, pp. 18-31)**

Respondent argues that neither the purposes of the Habeas Corpus Act, nor the express provisions of Section 2243 of that Act,<sup>4</sup> nor the decisions of this Court contain any authorization for Petitioner Walker's interrogatories. (Resp. Brief, pp. 18-31.)

Respondent begins with the statement that "Section 2243 does not give a district court a carte blanche in habeas corpus proceedings." (Resp. Brief, p. 18.) Petitioner has at no time argued that it does. The question is not whether this provision gives a district court carte blanche, but whether the provision gives the court the authority to permit the use of discovery interrogatories.

The language of the statute commands the district court to "dispose of the matter as law and justice require." Implicit in this provision is the command that the district court take steps to fulfill the statute's broad purpose. The District Court below determined that law and justice require a use of the discovery interrogatories in question. Unless the order is an abuse of the court's discretion, Section 2243 is sound authority for the order.

Respondent does not argue that the order of the court was an abuse of discretion; he contends instead that Peti-

---

<sup>4</sup> 28 U.S.C. §2243, which reads in material part as follows: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

tioner has no authority to exercise any discovery discretion whatsoever. If Respondent's bare assertion that Section 2243 does not give a district court "carte blanche" is applied to bar the present order, it would similarly bar any action taken by a district court pursuant to Section 2243 with the result that the section would be rendered virtually meaningless.

It is to be noted, moreover, that despite its argument against the application of the Federal Rules, Amicus United States has recognized the validity of Section 2243 as authority for a discovery order like the one ordered by Petitioner. In its brief, the United States has stated that

"we do not wish to be understood to be arguing that the district court may never order discovery in a habeas corpus or Section 2255 proceeding. Indeed, we do not doubt that the statutory command that the court should 'dispose of the matter as law and justice require' (28 U.S.C. 2243) would justify the court, in exceptional circumstances, in ordering discovery in such a proceeding." (Brief for the United States as Amicus Curiae, p. 4.)

Petitioner concurs fully in this conclusion.

A. SECTION 2246 OF THE HABEAS CORPUS ACT DOES NOT EXPRESSLY OR IMPLICITLY DEAL WITH DISCOVERY INTERROGATORIES, AND THUS DOES NOT PROHIBIT THEIR USE. (Resp. Brief, pp. 19-22)

Respondent contends that 28 U.S.C. §2246 contains an implied prohibition of the use of discovery interrogatories. Section 2246 provides a specific and limited procedure for obtaining evidence by deposition and affidavit. The statute does not address itself to discovery techniques of any kind,

much less does it purport to "regulate" the use of interrogatories in habeas corpus generally. Insofar as interrogatories are concerned, Section 2246 simply provides that they may be propounded in habeas corpus proceedings to all affiants of affidavits, whether or not they are parties (as would otherwise be required by Rule 33). In this regard, the statute actually *extends* the use of interrogatories to a situation where Rule 33 would not insure their use.

Nor do the "comments of those persons who wrote Section 2246" (Resp. Brief, p. 19) support Respondent's contention. On the contrary, the remarks of Senator Alexander Wiley and Judge John J. Parker, cited by Respondent (Resp. Brief, p. 19), demonstrate that the provision was enacted to "regulate" the use of *affidavits*, not interrogatories. The remarks of Judge Clarence Galston and Mr. George Longsdorf, cited by Respondent, establish that the passage of the provision mentioning the use of *depositions* was concerned with regulating procedures for "taking evidence" and not with regulating discovery procedures. Nothing in these remarks—or in the language of Section 2246—lends any support whatsoever to Respondent's contention that the provision requires all uses of interrogatories to be "limited to evidentiary purposes." To read such a remote prohibition into the silence of Section 2246 would be contrary to fundamental rules of statutory interpretation.

**B. CONGRESSIONAL AUTHORIZATION FOR DISCOVERY IN  
HABEAS CORPUS PROCEEDINGS PRESENTLY EXISTS.  
(Resp. Brief, pp. 22-23, 30-31)<sup>5</sup>**

Respondent argues that discovery interrogatories are such an innovation that they should not be used in habeas

<sup>5</sup> Part B (p. 22) and Part E (p. 30) of Respondent's brief both deal with the same point, and are treated together here.



corpus proceedings without "special congressional authorization". Respondent fails to recognize that congressional authorization already exists in Section 2243 (see Pet. Brief, pp. 8-12); in Section 1651(a), the All Writs Act (see Pet. Brief, pp. 18-22; *infra*, pp. 30-32); in congressional approval of the Federal Rules of Civil Procedure (see Pet. Brief, pp. 23-35; *infra*, pp. 32-44); and in the purposes behind the habeas corpus statutory scheme as interpreted by the Court in *Brown v. Allen*, *supra*, and *Townsend v. Sain*, *supra*. There is no reason to ask for further authority.

In support of his position that there is no congressional authorization for Petitioner's use of discovery interrogatories, Respondent cites Section 2246 and *Miner v. Atlass*, 363 U.S. 641 (1960). As has just been pointed out, Section 2246 is irrelevant to discovery interrogatories. *Miner v. Atlass* was a case where there was not only a total absence of "congressional authorization" for the use of a particular discovery technique (depositions) in a particular proceeding (admiralty), but where there was express legislative history which established a congressional intent to withhold such authorization. These legal and factual circumstances are totally distinguishable from the present case. (See Pet. Brief, pp. 15-18.)

C. THE DECISIONS OF THIS COURT PROVIDE THE DISTRICT COURTS WITH THE AUTHORITY TO USE DISCOVERY INTERROGATORIES IN HABEAS CORPUS PROCEEDINGS. (Resp. Brief, pp. 24, 25)

Respondent objects to Petitioner's citation of *Brown v. Allen*, *supra*, and *Townsend v. Sain*, *supra*, as authority for the use of discovery interrogatories in habeas corpus. Respondent contends that footnote 19 of *Brown v. Allen* is small support for such discovery since discovery was sup-

posedly not "at issue" in the case. A reading of the context in which footnote 19 appears, however, reveals that the availability of discovery was an integral part of the Court's holding.

*Brown v. Allen* affirmed the authority of the district court to inquire anew into the factual basis for a prisoner's detention where his petition set forth a prima facie case for relief. In determining whether to hold such an inquiry, the Court stated that the district court should examine the record with care. (344 U.S. at 464.) Footnote 19 then provides in detail the various means for securing and completing the record, including discovery. The footnote thus contains not an unconsidered "passing reference" to discovery as Respondent contends, but an explicit procedure crucial to the district court's ultimate trial responsibility.

The powers of inquiry found to be permissible in *Brown v. Allen* were in large part made mandatory in *Townsend v. Sain*. The authorization for discovery in *Brown v. Allen*—both express in footnote 19 and implied from the direction of the decision—are thus underscored in *Townsend v. Sain*. The plenary power afforded the district courts in *Townsend's* command to "take testimony and determine the facts *de novo*" (372 U.S. at 311) must include the power to take discretionary steps to that end. (See Pet. Brief, pp. 8-12)

D. DISCOVERY IS ESSENTIAL TO THE FACT-FINDING PROCESS,  
AND WILL NOT BURDEN THE PARTIES OR DEFEAT THE  
SUMMARY PROVISIONS OF THE HABEAS CORPUS ACT.  
(Resp. Brief, pp. 25-30)

In this section of his brief, Respondent makes a number of assertions which boil down to two basic contentions—namely, that (1) discovery cannot contribute to the fact-

finding process because the habeas corpus statutory scheme requires the facts to be known when the petition is filed; and (2) even if discovery could theoretically contribute to the fact-finding process, in practice discovery would be too burdensome to permit its use. Neither argument is supportable.

Respondent contends that the Habeas Corpus Act presently requires a petitioner to allege all the facts essential to his case before his petition may be filed. Indeed, says Respondent, a petition filed without such first-hand knowledge is in violation of the verification requirements of Section 2242. (Resp. Brief, pp. 26, 27) The discovery or development of any facts material to Petitioner's case therefore is said to be unnecessary, and would amount only to "fishing expeditions" in support of "speculation" by the Petitioner concerning the basis of his detention. Respondent thus labels the argument that discovery would contribute to the resolution of factual issues as "an astounding and self-contradictory paradox [sic]." (Resp. Brief, pp. 25-26, 27)

It should be obvious that the "speculation" which discovery would avoid is not the speculation of a prisoner concerning the grounds for his detention, but the speculation which the court must engage in when it is forced to resolve issues of fact without having all the material evidence before it. It is precisely such speculation, or litigation "in the dark", which discovery properly eliminates, as this Court and other authorities have long recognized. *Hickman v. Taylor*, 329 U.S. 495 (1947);\* *Moore and Garfinkel*, 4 *Moore's Federal Practice*, 1031-1036 (2nd ed. 1966).

---

\* "The new rules . . . restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of

Respondent's suggestion that a petitioner must state in his application all the evidentiary and ultimate facts on which his habeas corpus claim is based is totally unsupportable. The provisions of the Habeas Corpus Act clearly contemplate the likelihood that issues of fact may be developed after the filing of the petitioner's application. Section 2242 provides for amending or supplementing a habeas corpus petition during the course of the proceeding.<sup>7</sup> Section 2243 also recognizes that issues of fact may be developed in a habeas corpus proceeding.<sup>8</sup>

This Court has ruled that a petitioner's application need establish only a prima facie case, not set forth every supporting fact to be relied upon at the evidentiary hearing. *Brown v. Allen*, 344 U.S. 443, 502 (1953) (concurring opinion of Frankfurter, J., joined by a majority of the Court, and cited by Respondent herein. See Resp. Brief, p. 26). The standards set forth in *Townsend v. Sain* also recognize

---

discovery now serve (1) as a device, along with the pretrial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence of whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." (329 U.S. at 501)

<sup>7</sup> 28 U.S.C. §2242, which provides in material part as follows: "It [petitioner's application] may be amended or supplemented as provided in the rules of procedure applicable to civil actions."

<sup>8</sup> 28 U.S.C. §2243, which provides in material part as follows: "The applicant or person detained may, under oath, deny any of the facts set forth in the return, or allege any other material facts. The return and all suggestions made against it may be amended, by leave of court, before or after being filed." (Emphasis added.)

These provisions clearly recognize that the parties are not frozen to the facts alleged in the pleading, but are free to develop them as they are able.



that facts not necessarily known to a petitioner, nor alleged in his application, must be developed and presented at an evidentiary hearing. Such a procedure is thus not only consistent with the statutory scheme of the Habeas Corpus Act, but is positively compelled by it.

Court-sanctioned discovery is not simply a helpful technique in the fact-finding process, however. In some instances, as in the habeas corpus proceeding below, it is absolutely critical. Alfred Walker, the real party in interest, was arrested and his premises searched without an arrest warrant. The arrest and search were therefore constitutional only if the arresting officers had grounds, judged as reasonable men, to believe that a felony was being committed by Walker. The only grounds for such a belief were given to the police by the informant, one Frances Jenkins. No investigation independent of her story was made prior to the arrest and search.\* Grounds for the arrest and search, therefore, rested entirely on the informant and on the reasonableness of the arresting officer's reliance upon

---

\* The information leading to Walker's arrest was obtained through information-gathering activities which were not supervised or independently corroborated in any manner, even though it was clear that a serious risk of misinformation existed. The record established that the informant was known to the police as a narcotics user and marihuana was readily available to her. The record also established from police testimony that the informant was not searched prior to her entering the hotel to make an alleged purchase of marihuana from Walker and obtain information for the arrest. Nor was the informant searched upon her return from the hotel for narcotics or the allegedly marked twenty dollar bill with which she supposedly made her purchase. When the police entered Walker's room and arrested him, they discovered him to be, according to their own testimony, in a state of sound sleep even though he allegedly had sold marihuana to the informant only minutes before. Despite a thorough search of the petitioner, his clothing, his wallet, and the entire room, the police were unable to discover the twenty dollar bill which petitioner allegedly had accepted only minutes before. (See A. 13-15)



the information supplied. The reasonableness of the officer's decision, in turn, depended strictly upon past experience with the informant, and upon the proven reliability (or unreliability) of information provided by her on prior occasions.

At petitioner Walker's preliminary hearing, the Court inquired into the reliability of the informant on the issue of probable cause. The arresting officer, Sergeant Hilliard, testified that during the period of two years prior to the Petitioner's arrest, the informant had been a special agent for the police and had reliably given information which led to "at least" twenty arrests and convictions. (A. 16, including reference to preliminary hearing transcript.) Based on this particular testimony, the Court expressly found that the informant was reliable.<sup>10</sup>

At Walker's trial, however, on the question of reliability Sgt. Hilliard testified only to two—not twenty—occasions on which the informant had given the police allegedly reliable information. (A. 17, including reference to trial transcript.) In one of these two instances, the information obtained by the police led only to an arrest and no conviction.

---

<sup>10</sup> The transcript read as follows:

*The Court:* Well, let me take up your first motion as to the subpoenaing of the witness. My view is that the informant's role in this proceeding today was also to establish reasonable cause for the witness' entry and subsequent arrest and search—

*Mr. Hooley:* (Defendant Walker's counsel) Well, it also supplied the—

*The Court:* —after having given the identity (of the informant) and furnished the fact that he (Sgt. Hilliard) had 20 convictions based on past disclosures, which would make her reliable, and the identity was disclosed. So that part is over." (A. 16, 17, including reference to preliminary hearing transcript.)

tion.<sup>11</sup> Thus, in the first of two instances, it appeared that the information given by the informant may have been *unreliable* rather than reliable.

The other instance relied upon by the police<sup>12</sup> may have been equally unreliable—or nonexistent—since the informant has declared under penalty of perjury that she did not furnish the police with such information. (A. 17 See also A. 28, paragraph 5, for declaration of informant.) The informant has also stated under penalty of perjury that she was of the opinion that the only occasion on which she had furnished the police with information prior to Petitioner's arrest was in the case of one Kilbourne York, mentioned above. (A. 17)

It is clear that the informant's reliability is at best gravely in doubt. Petitioner Walker's interrogatories inquire directly into the establishment of the informant's reliability or unreliability. For that reason, they are crucial to the sole issue upon which the habeas corpus proceeding turns. Did the arresting officers truly have twenty prior arrests and convictions on the basis of information supplied by the informant? Did they have only the two prior arrests testified to at trial? Did they in fact have no prior arrests, as testified to by the informant herself? If the police had prior information which they contend was reliable, did they also have prior information which they knew was not? Was the informant reliable one out of two times,

---

<sup>11</sup> A Mr. Kilbourne York was arrested for illegal possession of narcotics, but was released when it became known that he had a valid prescription for its use. (A. 17, including reference to trial transcript.)

<sup>12</sup> This case involved one Robert Gibson. (A. 17, including reference to trial transcript.)

one out of ten times, one out of fifty times, or one out of 100 times? If the informant was frequently unreliable on prior occasions, the trial court may well conclude that a police officer with knowledge of such prior unreliability could not have reasonably acted on the sole basis of the informant's story, but would have been expected to seek a warrant, or at least to attempt to verify the informant's story with orthodox investigative procedures.<sup>13</sup> Petitioner Walker's interrogatories are, in short, a method of discovering the objective truth necessary to a resolution of the arrest and search issue.

The interrogatories have another valuable function apart from discovering material information. They also help determine the methods by which facts must be proved at trial. In the present case, they will help determine whether Walker must rely on the testimony of the informant alone, or can rely on the arresting officers as well. Conversely, only with the interrogatory answers will Walker be prepared, if necessary, to impeach the arresting officers or other witnesses for the State. Through advance preparation it will be possible for counsel and the court to avoid confusing and irrelevant testimony and a waste of valuable court calendar time resulting from a needlessly protracted hearing. In addition, if the interrogatory questions are propounded for the first time at the evidentiary hearing, there is a serious risk of inaccurate or incomplete information inherent in the taking of evidence at one particular

---

<sup>13</sup> Walker's arrest took place in the middle of the day, only a few blocks from the courthouse, where a warrant could easily have been sought and obtained if probable cause existed. See A. 31, and 32 for affidavit of counsel, paragraphs 10, 11, 12 and 13, and see A. 18, 19, 31 and 32 concerning the availability of judicial review of requests for warrants at the time of petitioner Walker's arrest.

sitting rather than over an extended period of time at the witnesses' convenience.<sup>14</sup>

Respondent contends that even if discovery is an appropriate procedure for finding the truth, it is so subject to abuse that it should not be permitted. (Resp. Brief, pp. 27, 28.) Respondent fears the "crafty petitioner" who, armed with the facts through discovery, "could perjure himself with virtual impunity" and thus not only dupe the court, but also "revel" in overburdening the State. (Resp. Brief, p. 28, including Note 4.) In short, Respondent views discovery as a "Pandora's box" which if opened would loose the horrors of perjury, abuse, and burden. (Resp. Brief, p. 28, Note 4.) These horrors are mere hallucinations.

That discovery helps *prevent* perjury rather than foster it is too well-settled for argument. Moore and Garfinkel, 4 *Moore's Federal Practice*, 1034 (1966); Ragland, *Discovery Before Trial*, 124 et seq. (1932); Sunderland, "Theory and Practice of Pretrial Procedure", 36 Mich. L.Rev. 215, 867-869 n. 2 (1937). Such is precisely the case here. The arresting officer has already given conflicting testimony on the alleged number of arrests and convictions supposedly obtained through the informant. Perhaps these discrepancies are the product of poor recollection. Perhaps they are intentional. Whatever the case, without the advance preparation afforded by the interrogatories, there is no reason to believe that the same conflicting or inaccurate testimony will not be repeated.

---

<sup>14</sup> For a discussion of the benefits of discovery applicable to the present case, such as avoiding conflicting testimony, avoiding surprise, preventing perjury, economy of the court's time, and finding material facts which cannot otherwise be found, see Moore and Garfinkel, 4 *Moore's Federal Practice*, 1034-1036 (1966).

Respondent's fear that discovery will aid petitioner Walker in committing perjury is groundless for additional reasons. The sole issues in question—the reliability of the informant and the state of mind of the arresting officers—are not issues on which Walker will even testify. While the record reveals discrepancies casting grave doubt on the existence of probable cause, Walker himself has no first-hand knowledge of the story given to the police by the informant either in his case or on prior occasions. Nor does he have knowledge of the mental processes the police used to conclude that they had cause for Walker's arrest. Walker was personally removed from all such pre-arrest activities. He could not perjure himself on these issues even if he were so inclined.

Respondent is also wrong in assuming that there will be other forms of abusive discovery in habeas corpus proceedings. Respondent does not, and cannot, contend that the interrogatories in the instant case are abusive or burdensome. The interrogatories are short, concise, and seek only information which is relevant to the issues to be tried at the evidentiary hearing.

But Respondent contends that in general, discovery will provide a prisoner with "unlimited opportunity to engage in court-sanctioned fishing expeditions". (Resp. Brief, pp. 11, 26-27, and 27 n. 3.) There is no validity whatsoever to the contention that fishing expeditions will be employed, or permitted if they are attempted.<sup>15</sup> The Federal Rules of

---

<sup>15</sup> This is true wholly aside from the fact that the cry of "fishing expedition" has been all but completely dismissed by the courts as a legitimate objection to discovery. As this Court stated in *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) "... the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve



Civil Procedure have long functioned to afford entirely adequate protection against inappropriate or overly burdensome discovery.<sup>16</sup>

Even if the discovery ordered below were sustained on grounds other than the Federal Rules of Civil Procedure, protection afforded by experience with the rules could likewise be adopted and employed by the court pursuant to its inherent power. Certainly, any authority which permits discovery must include the authority to limit it as well.

There is likewise no merit to Respondent's contention that he will be overburdened with discovery even within the framework of the existing rules. The premises of this contention are that "discovery may be initiated when suit is filed", and that a prisoner can serve interrogatories "even before his petition had been examined by a federal judge and a decision [is] made as to whether to issue an order to show cause." (Resp. Brief, p. 29.) This alleged possibility, coupled with the fact that the vast majority of prisoners proceed *in forma pauperis*, and are thus not restrained by litigation costs, supposedly would burden the State by forcing it to seek protection in otherwise unnecessary court hearings. (Resp. Brief, p. 29.)

A reading of the Habeas Corpus Act and the Federal Rules of Civil Procedure shows that these premises are

---

to preclude a party from inquiring into the facts underlying his opponent's case." See also Pike and Willis, "Federal Discovery in Operation", 7 Univ. of Chicago L. Rev. 297, 303 (1939).

<sup>16</sup> See Rule 30(b), Federal Rules of Civil Procedure, which provides in material part as follows: "[T]he court may make any . . . order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." See also Moore and Garfinkel, 4 *Moore's Federal Practice*, 1036-1039, 2023, 2024 (1966) on the adequacy of existing controls on abusive discovery.

wholly inaccurate. Rule 33 of the Federal Rules of Civil Procedure provides that interrogatories may not be served without permission of the court for ten days following the commencement of the action.<sup>17</sup> Section 1915 of Title 28 governing proceedings *in forma pauperis* provides that a *forma pauperis* proceeding commences only upon an order of the Court.<sup>18</sup> Thus, a petition which appears to be frivolous or malicious will be initially dismissed by the Court, and the opportunity for discovery will not arise.

Where the Court permits the action to proceed *in forma pauperis* and commences the matter with a show cause order,<sup>19</sup> the opportunity for discovery will not arise prior to another court review of the matter. Section 2243 of Title 28 requires the State's return to be filed within three days after the order to show cause, and the matter to be set for hearing within 5 days after the return. Thus a review of the petition is held within the ten day period preceding any discovery, and the State is not required to request or

---

<sup>17</sup> Rule 33, Fed. Civ. P., which provides in material part as follows: "Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained." (Similarly, depositions may not be taken without leave of court for twenty days after commencement of the action. Rule 26, Fed. R. Civ. P.)

<sup>18</sup> 28 U.S.C. Sec. 1915, "Proceedings in forma pauperis," which reads in material part as follows: "(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor."

<sup>19</sup> Since a prisoner's application to proceed *in forma pauperis* and his petition for the writ are submitted together and reviewed simultaneously by the court, the order granting leave to proceed *in forma pauperis* is normally joined with the order to show cause why the writ should not issue.

attend any hearing not already prescribed by law. If the petition is dismissed at this hearing, of course no discovery would ensue. If the writ of habeas corpus is granted, of course no discovery would be necessary. If the court should order an evidentiary hearing or further proceedings, any questions of the need for discovery could be reviewed and appropriate orders entered.

As a practical matter, whether the petition proceeds *in forma pauperis* or otherwise, and even if the action is deemed to commence with the filing of the petition, any party or the court could at any point request a continuance of discovery interrogatories without any burden whatsoever. Rule 30 of the Federal Rules of Civil Procedure permits the court to postpone any discovery until an appropriate stage of the habeas corpus proceeding.<sup>20</sup> Where the State is concerned, such a request would take no more effort than it presently exerts in requesting continuances for the filing of its returns, normally entered as a matter of course. This is not to conclude that discovery techniques should systematically be deferred beyond the 10 or 20 day periods prescribed in the rules. One can easily foresee instances in which the court might desire prompt dis-

---

<sup>20</sup> For instance, the court might stay all discovery until counsel is appointed for petitioner, or until an evidentiary hearing on fact issues is ordered, or simply until further leave of court is granted. The appointment of counsel should particularly serve to allay Respondent's fears of needless discovery. Such counsel, both in the interests of his client and as an officer of the court, will not be interested in spending his uncompensated time, or the time and goodwill of the court, with frivolous or abusive discovery. For a brief discussion of proposed stages at which discovery might commence beyond the 10 and 20 day periods provided in Rules 33 and 26, where such delay might be deemed appropriate, see Brief for Respondent (Petitioner herein) filed with the Ninth Circuit Court of Appeals pp. 12-15. (R. 28)

covery in order to grant the speedy relief which the writ is designed to afford, or to obtain a fresh and accurate record, or to preserve evidence. The ease with which discovery can be deferred where appropriate, however, merely points out that the supposed burden upon the State to do so is simply non-existent.<sup>21</sup>

Respondent's assumption that the great majority of prisoners will attempt to use discovery in bad faith is simply unfounded in logic and experience. If prisoners were truly interested only in harassing the State, they could have done so already. Prisoners have long been able to file civil rights actions (42 U.S.C. §1983 et seq.) to which the Federal Rules of Civil Procedure apply, and thereby invoke the spectrum of discovery techniques. The potential for abuse has long existed, yet abuse has not occurred. Perhaps Respondent fails to give sufficient credit to the number of petitioners who seek to vindicate their rights in good faith, even if it is true that most of them ultimately are unsuccessful. In any event, the spectre of abuse is irrelevant since the Federal Rules of Civil Procedure provide completely adequate protections.

Respondent also argues that discovery should not be permitted under any circumstances since it often results in delay, and delay is contrary to the speedy remedy which Section 2243 of the Habeas Corpus Act demands. (Resp. Brief pp. 29, 30.) Petitioner Walker and other prisoners no doubt share Respondent's concern for a speedy hearing, but it should be obvious that any delay occasioned by a petitioner's use of discovery is delay of the petitioner's own

---

<sup>21</sup> Of course, once discovery is appropriately commenced, Rule 30 continues to afford adequate protection from abuse.

choosing. Only abusive discovery by the State would unfairly prejudice a petitioner's right to the speedy determination required by Section 2243. Certainly, however, Respondent does not mean to suggest that the State would engage in such dilatory tactics.

Finally, Respondent argues that it is incongruous to permit in habeas corpus proceedings the use of civil discovery techniques which are not available to defendants in criminal proceedings. (Resp. Brief, p. 30.) The argument betrays a lack of understanding of the reasons that discovery has until recently<sup>22</sup> been limited in criminal actions, and of the significant differences between the two types of proceedings.

The reasons most commonly advanced for limited discovery are (1) that a guilty defendant will tamper with evidence or intimidate witnesses, and (2) that the defendant might use discovery against the State, yet protect himself from discovery by asserting his right against self-incrimination. See Note, "Civil Discovery In Habeas Corpus", 67 Colum. L.Rev. 1296, 1309 (1967).

In habeas corpus generally, as well as in the proceeding below, the threat of tampering or intimidation is almost non-existent since the petitioner is almost always incarcerated. Moreover, the privilege against self-incrimination is not likely to be involved in habeas corpus since the issue is, as it is in the present case, whether the petitioner's rights were respected and *not* whether he committed the crime for

---

<sup>22</sup> Even in criminal proceedings discovery has recently been broadened under the Federal Rules of Criminal Procedure and under the rules of many States. See Louisell, "The Theory of Criminal Discovery and the Practice of Criminal Law", 14 Vand. L.Rev. 921, 938-45 (1961).



which he was convicted. Neither of the reasons which have until recently hampered the beneficial use of discovery in criminal proceedings justify hampering discovery in habeas corpus.

### III.

#### **The District Court Has the Inherent Power to Authorize Discovery Interrogatories in a Habeas Corpus Proceeding. (Resp. Brief, pp. 31-39)**

Petitioner has cited numerous cases which authorize discovery procedures pursuant to the power of the court inherent in its duty to do justice. (Pet. Brief, pp. 12, 13.) Respondent contends that all these cases were erroneously decided since courts allegedly have no inherent power other than to regulate matters of internal administrative procedure, decorum, and courtroom order.

The inherent power of the courts is not limited to courtroom housekeeping chores. Federal courts have inherent power to take any action reasonably necessary for the administration of justice, so long as the court's action are not contrary to constitutional or statutory provisions. *Ex Parte Peterson*, 253 U.S. 300 (1920); *Reid v. Prentice-Hall*, 261 F.2d 700 (6th Cir. 1958); *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134 (1919); *Refior v. Lansing Dropforge Co.*, 124 F.2d 440 (6th Cir. 1942), cert. denied 316 U.S. 671 (1942); and *Ex Parte United States*, 101 F.2d 870 (7th Cir. 1939).

In *Ex Parte Peterson*, 253 U.S. 300 (1920), the question presented was whether the district court had the inherent power to appoint an auditor to inquire into certain books.

of account and report to the court on his findings (an activity, it should be noted, not wholly unlike discovery). This court affirmed the district court's power to do so as follows:

"There being no constitutional obstacle to the appointment of an auditor in aid of jury trials, it remains to consider whether Congress has conferred upon district courts power to make the order. There is here, unlike *Ex parte Fiske*, 113 U.S. 713, no legislation of Congress which directly or by implication forbids the court to provide for such preliminary hearing and report. But, on the other hand, there is no statute which expressly authorizes it. *The question presented is, therefore, whether the court possesses the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.*

*Courts have (at least, in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. Compare Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, 87-90, 6 Mor.Min. Rep. 317. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."* (253 U.S. at 312. Emphasis added.)

Respondent cites *Cary v. Curtis*, 44 U.S. (3 How.) 236, 244-45 (1845) as contrary authority. There the court's task was to construe an Act of Congress which purported to make any remedy for overcollection of duties run exclusively against the Treasury and not, as the practice had

been prior to the Act, against the collector as well. The plaintiffs argued that Congress could not prohibit a suit against the collector, for to do so would deprive them of a constitutional right to resort to the courts for a remedy. The Court rejected this argument, *inter alia*, on the ground that federal courts had the jurisdiction to entertain only those actions which Congress provided by statute. Unlike courts "existing by prescription or by the common law", they did not have the inherent power to extend their subject matter jurisdiction beyond statutory provisions whose construction deprived the courts of such jurisdiction. *Cary v. Curtis*, 44 U.S. (3 How.) 236, 244-246 (1845). It is this language which Respondent cites as authority for the proposition that no inherent power (besides "housekeeping power") exists in the federal courts.

*Cary v. Curtis* does not deny the existence of the courts' inherent powers *per se*, but only the court's power to act outside its statutory jurisdiction or in contradiction to other legislation. Petitioner has no quarrel with this case. Indeed, Petitioner recognizes that in *Ex Parte Peterson* this court expressly stated that a district court's inherent power may be exercised only where there is no constitutional or statutory prohibition to the contrary. As is shown elsewhere, however, (*supra*, pp. 9-10; 12-15) there is no such prohibition in this case.

Respondent also cites *Miner v. Atlass*, 363 U.S. 641 (1960) as denying the existence of the courts' inherent power. The court in *Miner* did not deny that district courts may exercise their inherent power under appropriate circumstances; the court merely found that a blanket exclusion of discovery techniques in admiralty was set forth in Rule 81(a)(1) of

the Federal Rules of Civil Procedure, as well as in the specific legislative history of the general admiralty rules. Again, however, no such exclusion or legislative history is to be found in the present case. (See Pet. Brief, pp. 16, 17.)

Respondent cites 28 U.S.C. Section 2246 as legislation contravening the court's inherent power, but as Petitioner has already pointed out, Section 2246 does not deal with or preclude discovery expressly or by implication. (See *supra*, pp. 9-10.) On the contrary, the Habeas Corpus Act and decisions interpreting the court's duties under that Act affirmatively command the courts to exercise their inherent powers necessary to fulfill their duties under the Act.<sup>23</sup>

Indeed, in the landmark decision of *Brown v. Allen*, (per Frankfurter, J., concurring opinion) this Court declared that a district court might appoint counsel for a petitioner pursuant *not* to any express provision in the Habeas Corpus Act (there is none), but pursuant to the court's "inherent authority", citing *Ex Parte Peterson*.<sup>24</sup> If the district court is able (as it has been for years without controversy) to exercise its inherent power to appoint counsel to aid in its

---

<sup>23</sup> In addition, as Petitioner has already argued, the Habeas Corpus Act, *Brown v. Allen*, and *Townsend v. Sain* should be viewed not merely as authority for the exercise of inherent power, but as direct authority for the employment of discovery interrogatories. (See Pet. Brief, pp. 8-12, and see *supra*, pp. 8-9; 10-12)

<sup>24</sup> "Care will naturally be taken that the frequent lack of technical competence of prisoners should not strangle consideration of a valid constitutional claim that is bunglingly presented. District judges have resorted to various procedures to that end. Thus, a lawyer may be appointed, in the exercise of the inherent authority of the District Court (cf., e.g., *Ex parte Peterson*, 253 U.S. 300), either as an amicus or as counsel for the petitioner, to examine the claim and to report, or the judge may dismiss the petition without prejudice." *Brown v. Allen*, 344 U.S. 443, 502 (1953).

examination and disposition of a petitioner's claim, there is no reason that it may not similarly aid itself with other procedures, such as discovery interrogatories.

#### IV.

**The "All Writs" Statute Provides a District Court With a Basis for Authorizing Discovery Interrogatories in a Habeas Corpus Proceeding. (Resp. Brief, pp. 39-47)**

Respondent contends that the All Writs Statute, 28 U.S.C. §1651(a) would not authorize the District Court to order discovery interrogatories because such an order would not conform to any common law "writ" (Resp. Brief, pp. 39-44), and because no order which is not "within the framework established by Congress to regulate the proceeding in which [the] power is exercised" is authorized by the All Writs Statute (Resp. Brief, pp. 45-47).

Petitioner does not disagree with the proposition that there was no "writ" at common law which was *identical* to the discovery order of the District Court. That is not the point. As Petitioner has pointed out (Pet. Brief, p. 20), this Court has made it clear that the All Writs Statute is not "an ossification of the practice and procedure of more than a century and a half ago" but is instead "a legislatively approved source of procedural instruments designed to achieve the 'rational ends of law.'" *Price v. Johnston*, 334 U.S. 266 (1948). As Petitioner's brief also demonstrated, the order in question here bears at least as strong a resemblance to the common law writs of subpoena duces tecum and subpoena ad testificandum, or at least the modern form of those writs, as the order in *Price v. Johns-*



ton releasing a prisoner to argue his case bore to any common law writ (Pet. Brief, pp. 21-22). Petitioner pointed out that these subpoena powers had been used by the Courts of Appeals to compel discovery of information at a limited hearing prior to hearings on the merits, *Bethlehem Shipbuilding Corp. v. N.L.R.B.*, 120 F.2d 126 (1st Cir. 1941); *Olson Rug Co. v. N.L.R.B.*, 291 F.2d 655 (7th Cir. 1961) and that this Court itself in *Brown v. Allen*, 344 U.S. 443, 464, n. 19 (1953) had approved such a procedure.<sup>25</sup> Petitioner further pointed out that the order of the District Court was essentially a streamlined and economic form of exercise of the subpoena powers for discovery purposes—one which would eliminate the burdens of a double hearing. After *Price v. Johnston*, *supra*, it is certainly no answer to this argument to say that the discovery order at issue here is not precisely identical in form to common law subpoenas.

Respondent's contention that the All Writs Statute authorizes only such orders as are "within the framework established by Congress to regulate the proceeding in which [the] power is exercised" is likewise nothing more than shadow-boxing. Petitioner readily concedes that "[w]here the statutes establish procedures or limit their application, a court cannot issue a writ [under the All Writs Statute] whose only effect would be to avoid those conditions and thwart the congressional policy." (Resp. Brief, p. 46) If this were a case like *Miner v. Atlass*, 363 U.S. 641 (1960), relied on by Respondent (Resp. Brief, p. 47) where the petitioner was attempting to employ discovery in proceedings in which Congress had directed that discovery was not to be used, Petitioner would admit that the All Writs Stat-

<sup>25</sup> Respondent concedes that these subpoena powers have been so employed. (Resp. Brief, pp. 42, 43, nn. 13, 14.)

ute would furnish no excuse for contravening the congressional will. Similarly, if this were a case like *Brown v. Allen*, 344 U.S. 443 (1953), *Holiday v. Johnston*, 313 U.S. 342 (1941) or *Walker v. Johnston*, 312 U.S. 275 (1941), the other cases relied on by Respondent (Resp. Brief, p. 46), involving contentions that a district court may act in square violation of express provisions of the Habeas Corpus Act, Petitioner would be the first to concede that the All Writs Statute could not sanction such procedure. However, there is no comparable expression of congressional will involved in this case. Respondent's suggestion that such an expression of congressional will with respect to the use of discovery interrogatories in habeas corpus may be found in Section 2246, in Civil Rule 81(a)(2) or in Note 5 to Criminal Rule 54(b)(5) is shown elsewhere in this brief to be completely without foundation. (See discussion of Section 2246 at pp. 9-10, *supra* and of Civil Rule 81(a)(2) and Note 5 to Criminal Rule 54(b)(5) at pp. 32-44, *infra*.)

## V.

**The Discovery Interrogatory Provisions of the Federal Rules of Civil Procedure Apply to Habeas Corpus Proceedings. (Resp. Brief, pp. 48-73)**

Respondent contends at one and the same time that the Federal Rules of Civil Procedure do not authorize the use of discovery interrogatories in habeas corpus proceedings because "the Federal Rules were not extended to habeas corpus" (Resp. Brief, p. 55; pp. 54-57 generally), and because such interrogatories do not meet explicit statutory standards set forth in Rule 81(a)(2) which govern the applicability of the Rules in habeas corpus. In other words,

Respondent says that none of the Federal Rules apply, then says that some apply, but not those pertaining to interrogatories. This obvious inconsistency aside, Respondent is wrong in both contentions.

A. RESPONDENT IS INCORRECT IN ARGUING THAT THE CIVIL RULES ARE TOTALLY INAPPLICABLE TO HABEAS CORPUS (Resp. Brief, pp. 52-58)

This "total inapplicability" position was taken by Respondent in his Response to the certiorari petition. As Petitioner pointed out in his opening brief, it is flatly contradicted by the language of the very provision upon which Respondent relies—Rule 81(a). It is belied by the language of Rule 81(a)(2) which in both its original and its amended forms explicitly declares that the Rules *are* applicable to habeas corpus "to the extent" that certain conditions exist. And it is belied by Rule 81(a)(1) which sets forth a blanket rule of exclusion for admiralty proceedings (now prize proceedings), but does *not* do so for habeas corpus proceedings. In short, while Respondent is correct in suggesting that Rule 81(a) is not a model of clarity in draftsmanship (Resp. Brief, pp. 49-51), the provision clearly does *not* exclude the Rules altogether from habeas corpus proceedings.

Nor does the legislative history of Rule 81(a)(2) suggest that a rule of blanket exclusion was intended by its framers. On the contrary, as Petitioner's opening brief pointed out, in the first draft of the Advisory Committee on Rules for Civil Procedure in which habeas corpus was mentioned (draft of February 20, 1937), habeas corpus was to be governed exclusively by existing statutes except for appeals, as to which the Rules would be applicable; how-

ever, this language—which *would* have provided the blanket exclusion for which Respondent contends—was abandoned in favor of the present language of Rule 81(a)(2). Because Respondent has raised some question about the existence of this early draft and because it does so graphically demonstrate that a rule of blanket exclusion was considered *but rejected* by the Advisory Committee, a copy of it is attached to this brief. (See Addendum, pp. 45-48)<sup>26</sup>

Respondent asserts that a contrary intent is evinced by certain remarks of Advisory Committee members William D. Mitchell, Edgar B. Tolman, and Judge Charles E. Clark, made after Rule 81(a)(2) was cast in its final form. This assertion is not borne out, however, by the texts of those remarks. For example, while Respondent is correct in stating that Mr. Tolman testified before the Judiciary Committee of the House of Representatives that “[the Rules] apply to appeals with regard to . . . habeas corpus . . . ,”

<sup>26</sup> This is a copy of the draft included in papers of the late Prof. Edmund M. Morgan, a member of the Advisory Committee. The handwriting on the draft is apparently Professor Morgan's.

Respondent takes issue with this draft by contending that he “has been unable to establish [its] existence”; that he “suspects” that Petitioner obtained the citation to the draft from a Note written by the Harvard Law Review; and that, although he does not wish to impugn the veracity of the Note or Petitioner's motives, he feels “obligated” to note that he has been unable to examine this “authority” “to which only the Harvard Law Review is privy.” (Resp. Brief, p. 58, n. 33)

Petitioner is at a loss to explain these extraordinary allegations. As for Respondent's questioning of the legitimacy of Petitioner's reliance on a published Law Review Note, one can only speculate as to Respondent's methods of doing research. Why Respondent contends that he has been unable to examine the document, or assumes that it is “privy” only to the Harvard Law Review, Petitioner is unable to say. The document exists in the open stacks of the Harvard Law School Library, and is available to any attorney in the United States, including counsel for Respondent, if he had chosen to ask for it.

(Resp. Brief, p. 53), Respondent is incorrect in implying that Mr. Tolman testified that the Rules "did not apply to habeas proceedings" (Resp. Brief, p. 54). Similarly, Petitioner does not quarrel with Respondent's representations that Mr. Mitchell advised the bar at various symposia conducted by the Institute on the Federal Rules of Civil Procedure in 1938 that the "rules" do not apply in habeas corpus except on appeals;<sup>27</sup> Mr. Mitchell's advice was accurate: Rule 81(a)(2) makes clear that except as to appeals the Rules *as a whole* do not apply in habeas corpus proceedings. But those remarks do not mean that Mr. Mitchell or any other member of the Advisory Committee felt that Rule 81(a)(2) rendered *each individual rule* inapplicable to habeas corpus. Certainly Judge Clark's reference in *United States ex rel. Jelic v. District Director of Immigration*, 106 F.2d 14, 20 (2d Cir. 1939), to the "limited application" of the Rules to habeas corpus cannot sustain such a conclusion.

Nor do the 1938 discussions by "contemporary practitioners" cited by Respondent support such a conclusion. (Resp. Brief, pp. 55-56) Respondent's quotation from an article in 4 John Marshall L. Q. 291, 293 (1938-39) merely states that "Rule 81 makes specific mention of a good many special actions which are governed in whole or in part by special statutory provisions and to which these rules do not apply *except to the extent stated in Rule 81*" (emphasis

---

<sup>27</sup> Such a remark does not appear, however, at ABA, PROCEEDINGS OF THE INSTITUTE ON THE FEDERAL RULES OF CIVIL PROCEDURE AT WASHINGTON, D.C., AND OF THE SYMPOSIUM AT NEW YORK CITY, 187 (1938), one of Respondent's citations to that effect. (Resp. Brief, p. 53)



added); it does not state that Rule 81 operates to render each of the Rules inapplicable in habeas corpus. The article from 23 Marquette Law Review 159, (1938), cited by Respondent (Resp. Brief, p. 56) did not state that "The exceptions mentioned in this rule [Rule 1] refer to certain proceedings named in Rule 81, such as bankruptcy, admiralty, citizenship, deportation and others [*including habeas corpus*], to which the new rules do not apply" (emphasis added); the bracketed language has been added by Respondent. But even if that passage had been written in the manner in which it appears in Respondent's brief, it, and the other passage to which Respondent refers, would do nothing more than indicate that "contemporary practitioners" understood that Rule 81(a)(2) meant that the Rules *in their entirety* were not applicable to habeas corpus—a proposition with which, as stated above, Petitioner does not quarrel. In sum, there is no "genealogy" of Rule 81 (a)(2) which would or could justify emasculating its language in the fashion suggested by Respondent.

Nor is there any other authority for doing so. The text of Note 5 of the Advisory Committee on the Federal Rules of Criminal Procedure to Criminal Rule 54(b)(5) (Resp. Brief, pp. 56-57), which does not mention the Federal Rules of Civil Procedure at all, itself refutes Respondent's contention that it "observed that the Federal Rules of Civil Procedure do not apply to habeas corpus cases." (Resp. Brief, p. 56) In the only other authority for such a reading of Rule 81(a)(2) suggested by Respondent, *Holiday v. Johnston*, 313 U.S. 342 (1941), the issue was whether Rule 53 of the Federal Rules of Civil Procedure (providing for reference to a master) was applicable in habeas corpus despite

its *inconsistency* with procedures prescribed in the Habeas Corpus Act. The holding of this Court that Rule 53 was inapplicable, and the passage from its holding cited by Respondent (Resp. Brief, p. 57), did nothing more than confirm that Rule 81(a)(2) preserved the statutory provisions touching habeas corpus procedure which existed when the Rules were enacted, and provided that the Rules should not be applicable insofar as they conflicted with such provisions. The Court did *not*, as Respondent suggests, hold those prior provisions "to be the *exclusive* procedure to be followed." (Resp. Brief, p. 56)<sup>28</sup> Neither this Court nor any other federal court, to Petitioner's knowledge, has ever rendered such a holding. Indeed, as Petitioner's opening brief points out, such a holding would conflict with twenty federal decisions from five circuits spanning two decades. (Pet. Brief, pp. 23, 24, 28).

B. RESPONDENT IS INCORRECT IN ARGUING THAT  
RULE 33 DOES NOT CONFORM TO THE REQUIRE-  
MENTS OF RULE 81(a)(2) (Resp. Brief, pp. 59-  
73)

Respondent also contends that Petitioner's use of written interrogatories is barred by Rule 81(a)(2) because of an alleged failure to meet that Rule's "first criterion" (that the Rule sought to be employed is not contrary to habeas corpus practice set forth in other federal statutes) and its "second criterion" (that the practice of Rules conform to habeas corpus practice prior to 1938).

<sup>28</sup> Such a holding would have made no sense because there were very few provisions in Title 28 concerning habeas corpus procedure. The procedural scheme in Title 28 for habeas corpus was—and still is—skeletal.

As for the first criterion, Respondent contends that "the use of . . . interrogatories in habeas is already regulated by statute and limited to evidentiary purposes." (Resp. Brief, p. 59). Respondent, however, fails to cite any federal statute in which the use of interrogatories is in fact so regulated or limited. Certainly 28 U.S.C. §2246 is not such a statute, as demonstrated above. (See *supra*, pp. 9-10). Section 2242 of Title 28 is also said by Respondent to have a limiting effect because it "plainly requires the petitioner to know and allege the facts. This leaves no room for discovery." (Resp. Brief, p. 60). The complete answer to this fallacious interpretation has also been set forth above. (See *supra*, pp. 14-15). In short, there is nothing in the "first criterion" of Rule 81(a)(2) to preclude Petitioner's use of interrogatories.

Nor is there any such ban in the second criterion of Rule 81(a)(2). Respondent's interpretation of that criterion—that Petitioner must show that "prior to the adoption of the Federal Rules in 1938, [1] interrogatories were used for discovery in civil actions and [2] that the practice in habeas corpus proceedings conformed thereto" (Resp. Brief, p. 60. Brackets added)—would not lead to a contrary conclusion.

There can be no doubt that the first part of this second criterion is satisfied. Respondent's lengthy discussion (Resp. Brief, pp. 62-68) of the discovery techniques available in civil actions prior to 1938 itself demonstrates that while there was little federal authority for discovery *depositions* prior to enactment of the Rules, Equity Rule 58, adopted in 1912, explicitly provided for the type of discovery which Petitioner seeks here, namely, discovery in interrogatories. (Resp. Brief, p. 67). Thus, to borrow Re-

spondent's own words, "prior to the adoption of the Federal Rules in 1938, interrogatories *were* used for discovery in civil actions." (Resp. Brief, p. 60).

As for the latter part of the second criterion, Petitioner's opening brief pointed out (Pet. Brief, p. 34) that trials of fact by the court were an established part of habeas corpus as well as ordinarily civil proceedings so that the "practice" or general format of habeas corpus did conform to the "practice" in other pre-1938 civil proceedings involving non-jury trials of fact. Under the "second criterion", the Rules are excluded only "to the extent that" they are not suitable for this common format or practice. Since discovery interrogatories are suitable, they are not excluded.

Respondent's argument that the second criterion is not satisfied in this case purports to rest on an analysis of the use of interrogatories in pre-1938 habeas corpus and pre-1938 ordinary civil proceedings. As Petitioner's opening brief noted, there is no warrant in the language of Rule 81(a) either for requiring a showing that the *specific procedure* sought to be employed was used in habeas corpus and other civil proceedings prior to 1938 or for requiring a comparison between the use of that *specific procedure* in pre-1938 habeas corpus and its use in other civil proceedings; such a showing and comparison was not required in the many federal cases which have heretofore permitted use of the Rules. Petitioner also pointed out that such an application of Rule 81(a)(2) would automatically exclude any procedural *advance* included in the Rules from use in habeas corpus because, by definition, such an advance could not have been used prior to enactment of the Rules. (Pet. Brief, pp. 30-31)

Respondent does not come to grips with the statutory language. His contentions that *Hunter v. Thomas*, 173 F.2d 810 (10th Cir. 1949) requires an analysis of specific procedures employed in habeas corpus prior to 1938 (Resp. Brief, pp. 59, 71-72) and that the other federal decisions cited by Petitioner are nothing more than "mutant progeny" of *Hunter v. Thomas* (p. 71) are based upon a misreading of those cases. In the *Hunter* case, the issue was whether the provisions in Rule 59 with regard to new trials in cases tried without a jury applied to habeas corpus proceedings. The court held that they did. This holding, however, was not based on the existence of a pre-1938 precedent for use of this specific procedure in habeas corpus; contrary to Respondent's assertion, *Tiberg v. Warren*, 192 Fed. 458, 462-463 (9th Cir. 1911), did not furnish such precedent. (That case did not involve "new trial" procedures at all because there was apparently no prior trial of fact; although the opinion is somewhat opaque, it appears that the petitioner had initially been discharged on the pleadings.) The holding in *Hunter v. Thomas* was instead based on the court's finding that the new trial provisions of Rule 59 were as appropriate for habeas corpus as for other "cases tried without a jury" because the practice in habeas corpus was that of a "civil proceeding" affording "a legal, not an equitable remedy." The decisions in *Bowdidge v. Lehman*, 252 F.2d 366 (6th Cir. 1958), *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962) *cert. denied*, 372 U.S. 915 (1963) and *Abel v. Tinsley*, 338 F.2d 514 (10th Cir. 1964), applying other Civil Rules, were predicated on the same type of analysis. While these cases cited *Hunter v. Thomas*, they are, as they should be, the "progeny" of the language of Rule 81(a)(2).



Respondent seeks to justify freezing habeas corpus procedures in their pre-1938 form by arguing that since this Court in *Miner v. Atlass*, 363 U.S. 641 (1960) "has recognized the discovery practice as a substantial innovation tantamount to a substantive right, it cannot be extended to a class of actions to which the Rules did not apply." (Resp. Brief, p. 61, n. 35). The argument is patently circuitous, assuming, as it does that the Rules do not apply. Moreover, it is based on a misreading of *Miner v. Atlass*. The passage from that case which Respondent cites, and the entire decision itself, is concerned not with "discovery" in general, but with "discovery by deposition" which the Court stated was "at once more weighty and more complex" than other procedures. Discovery by deposition is not at issue here. Discovery interrogatories are, and as stated above, by 1938 they could scarcely be regarded as a "substantial innovation."

In sum, there is nothing in the language of Rule 81(a)(2) or prior decisions either of this Court or the Courts of Appeal to suggest that only those specific procedures in the Federal Rules which were used in habeas corpus prior to 1938 are now available in habeas corpus. However, even if Rule 81(a)(2) had so frozen habeas corpus procedures, Petitioner would not be precluded from a use of discovery interrogatories. Since, as even Respondent concedes, "habeas corpus has always been considered a civil proceeding" (Resp. Brief, p. 65), there is no reason to believe that discovery interrogatories were not used pursuant to Equity Rule 58 in habeas corpus prior to enactment of the Rules. The "reasons" for a contrary belief which are advanced in Respondent's brief are ill-founded.

Respondent first points to a dearth of decisional and textual law as evidence that discovery interrogatories were not employed but, as Petitioner's opening brief pointed out (Pet. Brief, p. 33), this silence is as indicative that the procedure was used without controversy as that it was not used at all. It is inconceivable that the framers of Rule 81(a)(2) intended that the availability of a Rule would depend upon the chance that its counterpart in habeas corpus prior to the adoption of the Rules would be reported. There is certainly nothing in the language of Rule 81(a)(2) to support such a notion.

Second, Respondent argues that habeas corpus "was administered by courts of law rather than courts of equity" so that "the equity rules providing discovery did not apply to federal habeas proceedings." (Resp. Brief, p. 65). However, Respondent elsewhere concedes that it is not at all clear that habeas corpus was not a species of equitable proceeding. (Resp. Brief, p. 65, n. 41). And, as was pointed out in Petitioner's opening brief, an equity suit could be initiated simply to obtain discovery by way of interrogatories in aid of an action at law so that this discovery device was available in civil actions generally, whether legal or equitable. (Pet. Brief, p. 32). See Moore and Garfinkel, *4 Moore's Federal Practice*, pp. 2261-62 (2d ed. 1966). Thus, whether habeas corpus was technically a "legal" or "equitable" action is irrelevant insofar as the availability of interrogatories was concerned.

Third, Respondent contends that Equity Rule 58 was nothing more than the old chancery bill of discovery, and that since the old bill "was not entertained where the controversy involved 'moral turpitude' or arose 'from acts clearly immoral,'" Equity Rule 58 could not have been

employed in habeas corpus proceedings. (Resp. Brief, p. 66, n. 43, 67). In fact, however, Rule 58 was *not* treated simply as the successor to the old chancery bill of discovery, at least insofar as limitations on its use were concerned. As was stated in *Quirk v. Quirk*, 259 Fed. 597, 598 (S.D.Cal. 1919):

"The old rules are abolished. There is no reason why the procedure now should be hampered by restrictions imposed by any previous rules or procedure."

Accord: *Bankers Util. Co. v. David H. Zell, Inc.*, 15 F. Supp. 1072 (S.D.N.Y. 1936); *Perkins Oil Well Cementing Co. v. Owen*, 293 Fed. 759 (S.D.Cal. 1923).

And, in any event, habeas corpus proceedings have always been concerned not with "immoral acts" or "acts of moral turpitude," but with the process by which a petitioner has been tried and convicted.

Respondent also contends that since Equity Rule 58 interrogatories could only have been propounded to a "party", they would have been useless to a habeas corpus petitioner for he could only propound them to a warden who would know nothing except the fact of the Petitioner's detention (Resp. Brief; p. 68). However, under Equity Rule 58, as under Rule 33, interrogatories propounded to the representative of a real party in interest, such as the officer of a corporation or the warden as representative of the State, were required to be answered on the basis of the knowledge of not only that representative, but also of the other agents of the real party in interest. See *General Electric Co. v. Independent Lamp & Wire Co.*, 244 Fed. 825, 826 (D.N.J. 1915); *Cleminshaw v. Beech Aircraft Corp.*, 21 FRD 300 (D.Del. 1957). Thus, interroga-

tories propounded to a warden prior to 1938 could well yield information valuable to a petitioner. Moreover, even if Respondent were correct in his assertion that interrogatories would have been valueless to a petitioner, the same assertion certainly could not be made with respect to the value to the State of interrogatories propounded to a *petitioner*. In sum, discovery interrogatories would have been—and in all probability were—just as valuable a tool in pre-1938 habeas corpus practice as they were in other civil proceedings.

Finally, wholly aside from the technical construction of the language of Rule 81(a)(2), there are many vital policy considerations in favor of making Rule 33, and other appropriate Federal Rules, available in habeas corpus proceedings. These considerations are presented in the *Amici* brief of the NAACP *et al.*, and without repeating them here, Petitioner joins with *Amici* in urging them upon the Court.

### Conclusion

For the reasons stated, petitioner renews its prayer that the decision of the Court of Appeals be reversed, that its writ of mandamus and/or prohibition be quashed, and that the order of the District Court denying the objections of Respondent to petitioner Walker's interrogatories and compelling answers thereto be reinstated.

Respectfully submitted,

J. STANLEY POTTINGER,  
J. THOMAS ROSCH,  
*Attorneys for Petitioner.*

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE  
Office of the Secretary  
Supreme Court of the United States Building  
Washington, D. C.

*20*  
*Sept 27*

*13 a*

February 20, 1937

To the Members of the Sub-Committee  
on Style and Form:

Enclosed herewith is a loose-leaf binder containing a mimeographed copy of a draft of the rules into which have been incorporated the changes made by the Committee at its meeting, February 4 - 4, 1937.

Your attention is called to the attached letter of transmittal which accompanies the copies of this draft sent to members who are not on the Style Committee.

If the members of the Style Committee wish to have their suggestions mimeographed and distributed to other members, the Secretary's office will attempt to attend to this work as promptly as possible.

A duplicate copy of the draft is enclosed for working purposes, and with the idea that you may wish to note your suggestions at appropriate places on the margin of this copy and return it to the Secretary's office where we can attend to whatever compilation, mimeographing and distribution may be desired.

Also enclosed is a mimeographed copy of the stenographer's transcript of the proceedings at the February meeting.

*included*

Very sincerely,

Edgar B. Tolman.

*16 MORE COPIES AVAILABLE*



ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE  
Office of the Secretary  
Supreme Court of the United States Building  
Washington, D. C.

February 20, 1937

To the Members of the Advisory Committee:

Enclosed is a mimeographed redraft of the rules into which have been incorporated the changes which the Committee directed at its meeting, February 1 - 4, 1937.

Throughout this draft, marginal notes have been added to call attention to particular matters in the rules which the General Committee referred to the Style Committee, or concerning which they especially asked for further suggestions from members of the full Committee. Where there was some doubt as to the exact phraseology to be used, or where the previous draft seemed to require clerical correction not expressly directed by the Committee, bracketed phraseology or alternative wordings have been inserted, accompanied by explanatory marginal notes when they were necessary.

For your convenience, the proposed rule on condemnation, my memorandum and the list of statutes have been placed in the enclosed set of rules after the present Rule 82.

A table of contents is appended, and since the index handed you at the beginning of the last meeting does not need material revision on account of the changes made at that meeting, it may be used in connection with this draft.

Additional copies of the Appendix of Forms, as they were last amended and distributed, will be sent upon request.

It will be remembered that at the February meeting the Chairman suggested that all members of the Committee who desire to make comment or suggestion upon this draft might send their suggestions to the Secretary's office for mimeographing and distribution to the Style Committee and other members, in order to secure a possible exchange of views. It will be appreciated if the members will send in their comments as soon as they conveniently can in order that the mimeographing and distribution may be facilitated and spread as evenly as possible.

Yours very truly,

Edgar B. Tolman.

P. D. Feb., 1937  
Rule 90

# I. APPLICABILITY OF THE RULES

- 1 Rule 90. Application to District Courts;
- 2 The District of Columbia; State Law Defined;
- 3 Removed Actions; Actions before a Special
- 4 District Court; Actions Under the United
- 5 States Arbitration Act.
- 6 (a) District Courts. These rules shall not
- 7 apply to proceedings in admiralty, to proceedings
- 8 in bankruptcy or copyright, except in so far as
- 9 they may be made applicable thereto by rules pro-
- 10 mulgated by the Supreme Court of the United States,
- 11 (2) to proceedings in probate in the District Court
- 12 of the United States for the District of Columbia
- 13 or to the following proceedings <sup>(u)</sup> ~~except~~ <sup>up to and including entry of judgment</sup>
- 14 ~~therein~~ proceedings for admission to citizenship,
- 15 proceedings in habeas corpus, quo warranto pro-
- 16 ceedings [action of quo warranto] and proceedings
- 17 ~~[in rem]~~ for the forfeiture of ~~[specific]~~ property
- 18 ~~[for violation of]~~ [under] any statute of the
- 19 United States. <sup>up to and including entry of judgment</sup> Proceedings for admission to
- 20 citizenship, proceedings in habeas corpus, quo
- 21 warranto proceedings [actions of quo warranto]
- 22 and proceedings ~~[in rem]~~ for the forfeiture of
- 23 ~~[specific]~~ property ~~[for violation of]~~ [under]
- 24 any statute of the United States, shall be gov-
- 25 erned [by existing [applicable] statutes of the
- 26 United States] ~~[as provided by law and statutes of~~
- 27 ~~the United States]~~

*up to and including  
the entry of judgment,  
except in so far  
as the rules are  
otherwise provided  
by a statute of the  
U.S.*

*Not clear*

NOTE:- Placement and phraseology of habeas corpus, mandamus and quo warranto proceedings left to Style Committee. Rules to state somewhere "scire facias is abolished".

P. D. Feb., 1937  
 Rule 90  
 page 2

28 (aa) Mandamus Proceedings. Proceedings for  
 29 mandamus authorized by the Act of August 26, 1935,  
 30 c. 687, Title I, § 18, 49 Stat. 831, U.S.C., Title  
 31 15, § 79r(g),

32 [other statutes to be placed here]  
 33 and other [similar] statutes of the United States  
 34 shall be treated as actions in which the relief  
 35 sought is a mandatory injunction and the plead-  
 36 ings and practice shall conform to these rules  
 37 so far as applicable.

38 (b) The District of Columbia. Whenever  
 39 in these rules reference is made to a district  
 40 court or to a district judge, the reference shall  
 41 be taken to include also the District Court of  
 42 the United States for the District of Columbia  
 43 and a justice thereof; and whenever in these  
 44 rules reference is made to a circuit court of  
 45 appeals or to a judge thereof, the reference  
 46 shall be taken to include also the United States  
 47 Court of Appeals for the District of Columbia  
 48 and a justice thereof. Whenever in these rules  
 49 the law of the state wherein the district  
 50 court is held is made applicable, the law  
 51 applied in the District of Columbia shall govern  
 52 proceedings in the District Court of the United  
 53 States for the District of Columbia. Whenever

NOTE:- Subdivision (aa) is  
 a proposal by the Chairman  
 for the Style Committee.  
 Query:- Should executory  
 writs of mandamus issued  
 without express statutory  
 authorization be preserved  
 in Rule 83 or Rule 84.

See Dobie on Federal Pro-  
 cedure. PP. 327, 328.

# In the Supreme Court

OF THE  
**United States**

OCTOBER TERM, 1968

Office-Supreme Court, U.S.  
**FILED**

APR 18 1969

JOHN F. DAVIS, CLERK

**No. 199**

GEORGE B. HARRIS, Judge of the United States  
District Court for the Northern District of California,  
*Petitioner,*

VS.

LOUIS S. NELSON, Warden, California  
State Prison at San Quentin,  
*Respondent.*

On Writ of Certiorari to the Court of Appeals  
for the Ninth Circuit

## PETITION FOR A REHEARING

**THOMAS C. LYNCH,**

Attorney General of the State of California,

**ALBERT W. HARRIS, JR.,**

Assistant Attorney General of the State of California,

**DERALD E. GRANBERG,**

Deputy Attorney General of the State of California,

**CHARLES R. B. KIRK,**

Deputy Attorney General of the State of California,

6000 State Building,

San Francisco, California 94102,

Telephone: 557-3944,

*Attorneys for Respondent.*

## Topical Index

	Page
Preliminary statement .....	2
Argument .....	2
I. The all writs statute does not authorize discovery in habeas corpus because Congress specifically rejected discovery in enacting that provision .....	2
II. Discovery rules and procedures in habeas corpus should be nationally uniform and developed through statute rather than by individual courts .....	8
Conclusion .....	10

## Table of Authorities Cited

Cases	Pages
Adams v. Law, 57 U.S. 144 (1853) .....	3
Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) .....	3, 4
American Lithographic Co. v. Werekmeister, 221 U.S. 603 (1911) .....	3
Cary v. Curtis, 44 U.S. 235 (1845) .....	7
Craig v. Leitensdorfer, 127 U.S. 764 (1888) .....	3
Hickman v. Taylor, 329 U.S. 495 (1947) .....	4
Howard v. Railway Co., 101 U.S. 837 (1879) .....	3
In re McKenzie, 180 U.S. 536 (1901) .....	3
Miner v. Atlass, 363 U.S. 641 (1960) .....	8, 9
Price v. Johnston, 334 U.S. 266 (1948) .....	4
The Rio Grande, 86 U.S. 178 (1873) .....	3



	Pages
United States v. Wise, 370 U.S. 405 (1962).....	5
U.S. Alkali Ass'n v. United States, 325 U.S. 196 (1945)...	3
United States v. Rosenblum Truck Lines, 315 U.S. 50 (1942) .....	5
United States Bank v. Halstead, 23 U.S. 51 (1825).....	3, 4
Walker v. Johnston, 312 U.S. 275 (1941).....	8, 9

### United States Code and Statutes

Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81 .....	5
Act of September 24, 1789, ch. 20, § 15, 1 Stat. 82 .....	2, 3, 5
Act of September 24, 1789, ch. 20, §§ 13, 14, 25, 1 Stat. 80, 82, 85 .....	3, 7
Act of March 2, 1793, ch. 22, §§ 5, 8, 1 Stat. 334-35 .....	3
Act of May 31, 1870, ch. 64, §§ 14, 16, Stat. 143 .....	3
Act of June 22, 1874, tit. 13, ch. 12, § 716, 18 (1) Stat. 135	3
Act of June 22, 1874, tit. 13, chs. 11-12, 17, tit. 19, §§ 688, 709, 716-17, 719, 1786, 18(1) Stat. 127, 132, 135-37, 318..	3
Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828 .....	3
Act of March 3, 1911, ch. 231, §§ 234, 237, 240-41, 261-62, 264, 36(1) Stat. 1156-57, 1162 .....	3
Act of March 3, 1911, ch. 231, § 262, 36(1) Stat. 1162 ....	3
Act of June 30, 1926, tit. 28, chs. 9-10, §§ 342, 344, 347, 376-78, 44(1) Stat. 906, 908 .....	3
Act of June 30, 1926, tit. 28, ch. 10, § 377, 44(1) Stat. 908	3
28 U.S.C. §§ 342, 344, 347, 376-78 (1940 ed.).....	3
28 U.S.C. § 377 (1940 ed.) .....	3
28 U.S.C. § 1651(a) (1964 ed.) .....	2, 3
28 U.S.C. §§ 2072-73 (1964 ed.).....	7

# TABLE OF AUTHORITIES CITED

iii

## Texts and Other Authorities

Pages

2A W. Barron & A. Holtzoff, Federal Practice and Procedure .....	4
17 C.J., Damages (1919) .....	4
18 C.J., de ventre inspiciendo (1919) .....	4
71 C.J., Writ (1935) .....	4
2 G. Jacob, Law Dictionary (1797) .....	4
W. Maclay, Journal (1965 republication) .....	6
W. Maclay, Sketches of Debate (1880) .....	6
Sunderland, The New Federal Rules, 45 W.Va.L.Q. 5 (1938) .....	4
1 W. Tidd, Practice, 572-73 (4th Am.ed. 1856) .....	4
Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv.L.Rev. 49 (1923) .....	5, 6, 7

# In the Supreme Court

OF THE  
United States

---

OCTOBER TERM, 1968

---

No. 199

---

GEORGE B. HARRIS, Judge of the United States  
District Court for the Northern District of California,  
*Petitioner,*

vs.

LOUIS S. NELSON, Warden, California  
State Prison at San Quentin,  
*Respondent.*

---

On Writ of Certiorari to the Court of Appeals  
for the Ninth Circuit

## PETITION FOR A REHEARING

---

The respondent, Louis S. Nelson, respectfully petitions under Rule 58 for a rehearing by this Honorable Court of the above-entitled cause.

### PRELIMINARY STATEMENT

Through this petition for rehearing, respondent respectfully urges this Court to reconsider its analysis of the authority to order discovery arising under the All Writs Statute, since the opinion herein was reached without consideration of legislative history clearly showing that Congress did not intend that statute to permit discovery.

Respondent also submits that discovery rules in habeas corpus should be uniform nationally, and that that result can only be achieved through rule-making or statute, not by the case by case process sanctioned by the opinion herein.

---

### ARGUMENT

#### I

**THE ALL WRITS STATUTE DOES NOT AUTHORIZE DISCOVERY IN HABEAS CORPUS BECAUSE CONGRESS SPECIFICALLY REJECTED DISCOVERY IN ENACTING THAT PROVISION.**

In its opinion (p. 12), this Court found authorization for discovery orders in federal habeas corpus proceedings under the All Writs Statute, title 28, United States Code, section 1651(a). But reliance upon this statute is improper, for Congress specifically rejected discovery in enacting that provision.

The Judiciary Act of 1789 authorized United States courts to issue "all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."<sup>1</sup> Since its original

---

<sup>1</sup>Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81, 81-82.

enactment, the All Writs Statute has been continuously in force without substantial change. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272-73 (1942).<sup>2</sup> But neither the statutory writs<sup>3</sup> nor those previously sanctioned by this Court<sup>4</sup> could be utilized

<sup>2</sup>Compare Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81; Act of June 22, 1874, tit. 13, ch. 12, § 716, 18(1) Stat. 135 (Rev. Stat. of 1873, § 716); Act of March 3, 1911, ch. 231, § 262, 36(1) Stat. 1162 (Judicial Code of 1911, § 262); Act of June 30, 1926, tit. 28, ch. 10, § 377, 44(1) Stat. 908 [28 U.S.C. § 377 (1926 ed.)]; 28 U.S.C. § 377 (1940 ed.); 28 U.S.C. § 1651(a) (1964 ed.).

<sup>3</sup>Statutory writs arising under the Judiciary Act of 1789 included mandamus, *scire facias*, writs of prohibition directed to district courts sitting in admiralty, and writs of error to state courts [Act of September 24, 1789, ch. 20, §§ 13-14, 25, 1 Stat. 80-82, 85]. The writ of subpoena *duces tecum* was suggested by section 15 [Act of September 24, 1789, ch. 20, § 15, 1 Stat. 82]. In 1793, writs of *ne exeat*, *fiery facias*, and injunction were added [Act of March 2, 1793, ch. 22, §§ 5, 8, 1 Stat. 334-35]. *Quo warranto* was added in 1870 [Act of May 31, 1870, ch. 64, § 14, 16 Stat. 143]. The Revised Statutes (§§ 688, 709, 716-17, 719, 724, 1786) included all of these except *fiery facias* [Act of June 22, 1874, tit. 13, chs. 11-12, 17, tit. 19, §§ 688, 709, 716-17, 719, 1786, 18(1) Stat. 127, 132, 135-37, 318]. Certiorari was added in 1891 [Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828]. With the exception of *quo warranto* and subpoena *duces tecum*, the writs found in the Revised Statutes and subsequent enactments were carried over into the Judicial Code of 1911 (§§ 234, 237, 240-41, 261-62, 264) [Act of March 3, 1911, ch. 231, §§ 234, 237, 240-41, 261-62, 264, 36(1) Stat. 1156-57, 1162] and the 1926 edition of title 28, United States Code (§§ 342, 344, 347, 376-78) [Act of June 30, 1926, tit. 28, chs. 9-10, §§ 342, 344, 347, 376-78, 44(1) Stat. 906, 908]. The 1940 edition of title 28 included those found in the 1926 edition [28 U.S.C. §§ 342, 344, 347, 376, 377, 378 (1940 ed.)] plus *quo warranto* [28 U.S.C. § 377a (1940 ed.)]. None of these writs were vehicles for discovery.

<sup>4</sup>*E.g.*, *U.S. Alkali Ass'n v. United States*, 325 U.S. 196, 201-04 (1945) (certiorari, mandamus, and prohibition); *American Lithographic Co. v. Werckmeister*, 221 U.S. 603, 610 (1911) (subpoena *duces tecum*); *In re McKenzie*, 180 U.S. 536, 549-51 (1901) (superedeas); *Craig v. Leitensdorfer*, 127 U.S. 764, 771 (1888) (attachment); *The Rio Grande*, 86 U.S. (19 Wall.) 178, 188 (1873) (certiorari to correct omissions); *United States Bank v. Halstead*, 23 U.S. (10 Wheat.) 51, 53-65 (1825) (execution); see *Howard v. Railway Co.*, 101 U.S. 837, 849 (1879) (assistance); *Adams v. Law*, 57 U.S. (16 How.) 144, 149 (1853) (*procedendo*). None of these would permit discovery.



for discovery.<sup>5</sup> Nor were any of the common law writs available for general discovery purposes.<sup>6</sup> Consequently, it is clear that those writs "agreeable to the principles and usages of law" did not permit discovery.

This Court has several times held that the All Writs Statute is not to be confined to writs existing in 1789 when the Judiciary Act was passed. *Price v. Johnston*, 334 U.S. 266, 282 (1948); *United States Bank v. Halstead*, 23 U.S. (10 Wheat.) 51, 55 (1825). The All Writs Statute has been termed—and was so characterized in the opinion herein (p. 12)—a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" *Price v. Johnston*, *supra*, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942). But the

---

<sup>5</sup>Until the advent of the Federal Rules of Civil Procedure, there was no provision for discovery under federal law, with the exception of Equity Rule 58. 2A W. Barron & A. Holtzoff, *Federal Practice and Procedure* § 641 at 11 (Wright rev. 1961); see *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947). Accidental discovery was also possible under a statute permitting depositions *de bene esse*, a statute authorizing depositions under *dedimus potestatum* or *in perpetuum*, and Equity Rule 47 which allowed pre-trial depositions of witnesses in exceptional cases. Sunderland, *The New Federal Rules*, 45 W.Va.L.Q. 5, 19 (1938); quoted in 2A W. Barron & A. Holtzoff, *Federal Practice and Procedure* § 641, n.10 at 12 (Wright rev. 1961). The inapplicability of these provisions to habeas corpus was discussed in Respondent's Brief, Argument V, at pp. 62-68.

<sup>6</sup>The common law writs are catalogued in *Corpus Juris*. 71 C.J. *Writ* §§ 6-13, at 1628-33 (1935). Only two provided even limited discovery. 71 C.J. *Writ* § 13, n.56 at 1631-32 (1935) (writ of inquiry; writ *de ventre inspiciendo*). The writ of inquiry arose in default cases and was issued as a commission to the sheriff to ascertain the amount of damages. 17 C.J. *Damages* § 352 (1919); 1 W. Tidd, *Practice* 572-73 (4th Am. ed. 1856). The writ *de ventre inspiciendo* was issued "to search a Woman who saith she is with Child and thereby withholdeth lands from the next heir. . . ." 2 G. Jacob, *Law Dictionary*, *ventre inspiciendo* (1797); accord, 18 C.J. 1032, *de ventre inspiciendo* (1919). Obviously neither of these writs permitted general discovery in habeas corpus.

adoption of any procedure under the aegis of the All Writs Statute presupposes congressional approval. Yet as this Court noted in *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 53 (1942), "The question here, as in any problem of statutory construction, is the intention of the enacting body." See also *United States v. Wise*, 370 U.S. 405, 412-14 (1962). And it is absolutely clear that Congress did not intend the All Writs Statute to authorize discovery.

The All Writs Statute was passed by the First Session of the First Congress as section 14 of the Judiciary Act of 1789.<sup>7</sup> Section 15, as enacted, governed the production of books and papers in the nature of a subpoena *duces tecum*.<sup>8</sup> But the original draft of section 15 included a provision for general discovery against defendants in actions at law in all courts of the United States. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv.L.Rev. 49, 95 (1923).<sup>9</sup> Its introduction in the

<sup>7</sup>Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81.

<sup>8</sup>Act of September 24, 1789, ch. 20, § 15, 1 Stat. 82.

<sup>9</sup>This clause was as follows:

"All the said Courts of the United States shall have power in the trial of actions at law on motion of a plaintiff, and due notice thereof as aforesaid, and his rendering it probable to the satisfaction of the Court that he has by casualty and without fault or negligence of his own been deprived of evidence necessary to support his acts, to require the defendant to disclose on oath his or her knowledge in the cause in cases and under circumstances where a respondent might be compelled to make such disclosure on oath by the aforesaid rules of chancery." Draft of Judiciary Act of 1789, § 15, as found in Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv.L.Rev. 49, n.103 at 96 (1923).

This draft may be found in the Archives of the United States. Warren, *supra*, 37 Harv.L.Rev. at 49-50.

Senate on June 29, 1789, gave rise to a long and heated debate. *Id.* at 96-97. After Senators William Maclay and William Paterson had forcefully argued against it, Senator Paterson moved to strike the clause from the bill. W. Maclay, Journal 89-90 (1965 republication).<sup>10</sup> Senator Oliver Ellsworth, the section's author, rose in its defense, and before the Senate adjourned for the day he moved that the clause be amended to permit the defendant to also have discovery against the plaintiff. *Id.* at 90-91. The section was again considered on June 30, and Senator Ellsworth's amendment permitting mutual discovery was defeated. *Id.* at 91-92. Shortly thereafter the discovery clause was stricken from section 15. *Id.* at 92.

"[The Judiciary Act of 1789] was a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the minimum powers and jurisdiction." Warren, *supra*, 37 Harv.L.Rev. at 53.

See also 1 Annals of Cong. 854-56 (1789). (remarks of Representative Stone). The rejection of the discovery clause in the draft version of section 15 makes it patently clear that the Congress did not intend to give the power to order discovery to the federal judiciary under the Judiciary Act of 1789. That dis-

---

<sup>10</sup>The journal kept by Senator Maclay is the only extant record of the debates in the Senate which were, for the first few Congresses, held behind closed doors. Report of March, 1869, presented to the Committee on the Library by A. Spofford, the Librarian of Congress, as found in W. Maclay, Sketches of Debate iii (1880) (first printing of Maclay's journal).

covery was originally included in section 15, rather than section 14, and was stricken therefrom, also demonstrates that the Congress had no intention of authorizing discovery through the All Writs Statute.<sup>11</sup>

"It is clear now that very important and, in some instances, vital changes were made from the Draft Bill before it became law. And it may well be contended that had the Judges of the Supreme Court been familiar with these changes and with the history of the progress of the Bill in Congress, several of the leading cases before that Court might have been decided differently." Warren, *supra*, 37 Harv.L.Rev. at 51.

This is one of those cases.

"[T]he courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it. ... ." *Cary v. Curtis*, 44 U.S. (3 How.) 235, 244-45 (1845).

In view of the legislative history of sections 14 and 15 of the Judiciary Act of 1789, it is inconceivable that this Court could properly find Congressional authorization for discovery in federal habeas corpus under the All Writs Statute.

<sup>11</sup>It is worthy to note that subsequent discovery provisions have been approved by Congress before being implemented. See 28 U.S.C. §§ 2072-73 (1964 ed.).



## II

**DISCOVERY RULES AND PROCEDURES IN HABEAS CORPUS  
SHOULD BE NATIONALLY UNIFORM AND DEVELOPED  
THROUGH STATUTE RATHER THAN BY INDIVIDUAL  
COURTS.**

In its opinion (pp. 12-13), this Court sanctions the development of discovery rules and procedures in habeas corpus by individual district courts, without providing any guidelines. It is obvious that the only result will be different rules and procedures in different circuits or districts. In rejecting the development of discovery rules by individual district courts in *Miner v. Atlass*, 363 U.S. 641, 649-50 (1960), this Court observed:

“[T]he matter is one which, though concededly ‘procedural,’ may be of as great importance to litigants as many a ‘substantive’ doctrine, and which arises in a field of federal jurisdiction where nation-wide uniformity has traditionally always been highly esteemed.

“The problem then is one which particularly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court . . . designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords.” (Emphasis added.)

Certainly habeas corpus—even more than admiralty—is an area in which national uniformity “has traditionally always been highly esteemed.” Cf. *Walker*



*v. Johnston*, 312 U.S. 275, 285 (1941). Such uniformity is made impossible by the decision herein, and can only be assured through rule-making or statute. To assure national uniformity, this Court should refer the problem to Congress rather than launching the district courts in a rudderless ship.<sup>12</sup> We agree, therefore, with Mr. Justice Harlan's dissent on this issue (pp. 3-5), and since the All Writs Statute does not authorize discovery, we respectfully submit that his persuasive analysis should be adopted and this Court should follow the principles set out in *Miner v. Atlass*, 363 U.S. 641, 649-52 (1960).

---

<sup>12</sup>In urging the orderly approach to the development of discovery rules permitted by rule-making or statute, respondent does not believe that any injustice would be worked against habeas petitioners. It is respondent's opinion that the flexible habeas corpus procedures under existing statutes can adequately develop the facts. As Mr. Justice Harlan points out (dissent, p. 2), petitioner herein already knew the officer's identity and could call him as a witness. If the existence of other material witnesses is developed at the hearing, the district judge can continue the matter until they can be called. Though this may be somewhat more cumbersome than pre-trial discovery, it nevertheless assures the full development of the facts, and demonstrates that no petitioner would be prejudiced by awaiting the orderly development of rules.

### CONCLUSION

For the foregoing reasons, respondent respectfully requests that a rehearing be granted in this case so that the Court may properly assess the power to order discovery under the All Writs Statute in the light of its legislative history and render a decision which will not foster the piecemeal and divergent development of discovery rules.

Dated, San Francisco, California,

April 14, 1969.

THOMAS C. LYNCH,

Attorney General of the State of California,

ALBERT W. HARRIS, JR.,

Assistant Attorney General of the State of California,

DERALD E. GRANBERG,

Deputy Attorney General of the State of California,

CHARLES R. B. KIRK,

Deputy Attorney General of the State of California,

*Attorneys for Respondent.*

### CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for respondent in the above-entitled cause and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,

April 14, 1969.

CHARLES R. B. KIRK,

*Counsel for Respondent.*

# SUPREME COURT OF THE UNITED STATES

No. 199.—OCTOBER TERM, 1968.

George B. Harris, Judge of U. S. District Court for the Northern District of California, Petitioner, v. Louis S. Nelson, Warden.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
---	---	---

[March 24, 1969.]

MR. JUSTICE FORTAS delivered the opinion of the Court.

This case presents the question whether state prisoners who have commenced habeas corpus proceedings in a federal district court may, in proper circumstances, utilize the instrument of interrogatories for discovery purposes.

## I.

Petitioner is the Chief Judge of the United States District Court for the Northern District of California. Respondent is the warden of the California State Prison at San Quentin. The proceeding was initiated by Alfred Walker who had been convicted in the California courts of the crime of possession of marijuana. After exhausting state remedies, he filed a petition for habeas corpus in the federal District Court, alleging that evidence seized in the search incident to his arrest was improperly admitted into evidence at his trial. The basis for this claim was his allegation that the arrest and incidental search were based solely on the statement of an informant who, according to Walker's sworn statement, was not shown to have been reliable; who, in fact, was unreliable; and whose statements were accepted by the police without proper precautionary procedures.

The District Court issued an order to show cause and respondent made return. Thereafter, Walker filed a

motion for an evidentiary hearing, which the District Court granted. Two months later, Walker served upon the respondent warden a series of interrogatories, pursuant to Rule 33 of the Federal Rules of Civil Procedure, seeking discovery of certain facts directed to proof of the informant's unreliability. Respondent filed objections to the interrogatories, alleging the absence of authority for their issuance. The District Judge, without stating his reasons, disallowed the objections and directed that the interrogatories be answered. Respondent applied to the Court of Appeals for the Ninth Circuit for a writ of mandamus or prohibition. The Ninth Circuit vacated the order of the District Court. It held that the discovery provisions of the Federal Rules of Civil Procedure were not applicable to habeas corpus proceedings and that 28 U. S. C. § 2246, the statutory provision specifically relating to the use of interrogatories in habeas corpus proceedings, did not authorize their use for discovery. *Wilson v. Harris*, 378 F. 2d 141.

Because of the importance of the questions presented and the diversity of views among the district and appellate courts that have considered the problem,<sup>1</sup> we granted

---

<sup>1</sup> Some courts have joined the Ninth Circuit in holding the discovery provisions of the Federal Rules wholly inapplicable to habeas corpus proceedings. *E. g.*, *Sullivan v. United States*, 198 F. Supp. 624, 625-627 (D. C. S. D. N. Y. 1961). Others have held that they apply only by "analogy." *Wilson v. Weigel*, 387 F. 2d 632, 634, n. 3 (9th Cir. 1967); cf. *United States ex rel. Jelic v. District Director of Immigration*, 106 F. 2d 14, 20 (2d Cir. 1939) (opinion by Judge Clark, who served as Reporter of the Advisory Committee on the Federal Rules of Civil Procedure). Several courts have held the Rules applicable because habeas is characterized generally as a "civil" proceeding. *E. g.*, *United States ex rel. Seals v. Wiman*, 304 F. 2d 53, 64 (5th Cir. 1962); cf. *Schiebelhut v. United States*, 318 F. 2d 785, 786 (6th Cir. 1963) (28 U. S. C. § 2255 action). Some courts have sustained the use of particular discovery rules under the Federal Rules of Civil Procedure as necessary to effectuate statutory policy with respect to habeas corpus. *E. g.*, *Knowles v. Gladden*, 254 F.

certiorari. We agree with the Ninth Circuit that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings and that 28 U. S. C. § 2246 does not authorize interrogatories except in limited circumstances not applicable to this case; but we conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a *prima facie* case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to eliciting facts necessary to help the court to "dispose of the matter as law and justice require." 28 U. S. C. § 2243. Accordingly, we reverse and remand the case in order that the District Court may reconsider the matter before it in light of our opinion and judgment.

## II.

The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended . . . ." U. S. Const., Art. I, § 9, cl. 2. The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

As Blackstone phrased it, habeas corpus is "the great and efficacious writ, in all manner of illegal confine-

---

Supp. 643, 644-645 (D. C. D. Ore. 1965), *aff'd*, 378 F. 2d 761 (9th Cir. 1967). Others have apparently assumed that the rules applied to habeas without discussion of the question. *E. g.*, *Fortner v. Balkcom*, 380 F. 2d 816, 818 (5th Cir. 1967).



ment."<sup>2</sup> As this Court said in *Fay v. Noia*, 372 U. S. 391, 401-402 (1963), the office of the writ is "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." See *Peyton v. Rowe*, 391 U. S. 54, 65-67 (1968).

It is now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing. *Townsend v. Sain*, 372 U. S. 293, 313 (1963); *Brown v. Allen*, 344 U. S. 443, 464, n. 19 (1953). And this Court has emphasized, taking into account the office of the writ and the fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that habeas corpus proceeding must not be allowed to founder in a "procedural morass." *Price v. Johnston*, 334 U. S. 266, 269 (1948).

There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose have resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: "The language of Congress, the history of the writ, the decisions of this Court, all make

---

<sup>2</sup> 3 W. Blackstone, Commentaries \*1131. See generally *Fay v. Noia*, 372 U. S. 391, 399-415 (1963). Cf. *Frank v. Magnum*, 237 U. S. 309, 346 (Holmes and Hughes, JJ., dissenting) (1915), "[H]abeas Corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside . . . and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."

clear that the power of inquiry on federal habeas corpus is plenary." *Townsend v. Sain, supra*, at 312.

In the present case, we are confronted with a procedural problem which tests the reality of these great principles. We are asked by Walker to establish the existence of rights in those in custody to discover facts which may aid their petitions for release. We are asked to do this by declaring that the provisions of the Federal Rules of Civil Procedure granting such rights to litigants in civil causes are available to Walker; or if we refuse so to conclude, to affirm the existence of power in the District Court to authorize discovery by written interrogatories. We address ourselves to those issues.

### III.

Rule 1 of the Federal Rules of Civil Procedure provides that "These rules govern the procedure in the United States district courts in all suits of a civil nature . . . with the exceptions stated in Rule 81." At the time of the decision below Rule 81 (a)(2) provided, in relevant part, that the Rules were not applicable in habeas corpus "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity."<sup>3</sup>

---

<sup>3</sup> Rule 81 (a)(2) was amended, effective July 1, 1968, to read, "These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." The amendment merely eliminated references to appellate procedure made inappropriate by the adoption of the Federal Rules of Appellate Procedure and does not affect the issue before us. See Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 43 F. R. D. 61, 164 (explanatory note to the proposed revision of Rule 81 (a)(2)).

The Court of Appeals for the Ninth Circuit held that the second requirement—"conformity" with practice—made it necessary to show that "prior to September 16, 1938, discovery was actually being used in habeas proceedings, and that such use conformed to the then discovery practice in actions at law or suits in equity." 378 F. 2d, at 144. No such showing was made and it is not here contended that it can be made. Walker contends, however, that the rule requires only a showing that habeas proceedings conformed generally to pre-existing practice in law and equity, and he contends that this general requirement is met.

We need not consider this contention that the Court of Appeals took an unnecessarily restricted view of the thrust of the "conformity" requirement, because for other reasons, we conclude that the intended scope of the Federal Rules of Civil Procedure and the history of habeas corpus procedure, make it clear that Rule 81 (a) (2) must be read to exclude the application of Rule 33 in habeas corpus proceedings.

It is, of course, true that habeas corpus proceedings are characterized as "civil." See, *e. g.*; *Fisher v. Baker*, 203 U. S. 174, 181 (1906). But the label is gross and inexact.<sup>4</sup> Essentially, the proceeding is unique. Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense. There is no indication that with respect to pretrial proceedings for the development of evidence, habeas corpus practice had conformed to the practice at law or in equity "to the extent" that the application of rules newly developed in 1938 to govern discovery in "civil" cases should apply

---

<sup>4</sup> The degree to which this characterization excessively simplifies a complex history is discussed in Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 Can. Bar. Rev. 92 (1938), and Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ*, 18 Can. Bar. Rev. 10, 172 (1940). Cf. *Sullivan v. United States*, 198 F. Supp. 624 (D. C. S. D. N. Y. 1961).

in order to avoid a divergence in practice which had theretofore been substantially uniform. Although there is little direct evidence, relevant to the present problem, of the purpose of the "conformity" provision of Rule 81 (a)(2), the concern of the draftsmen, as a general matter, seems to have been to provide for the continuing applicability of the "civil" rules in their new form to those areas of practice in habeas corpus and other enumerated proceedings in which the "specified" proceedings had theretofore utilized the modes of civil practice. Otherwise, those proceedings were to be considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate.<sup>5</sup>

Such specific evidence as there is with respect to the intent of the draftsmen of the rules indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings. At the very least, it is clear that there was no intention to extend to habeas corpus, as a

<sup>5</sup> The federal courts have applied some noncontroversial rules in habeas corpus proceedings. *E. g.*, Rule 6 (b) (2), extension of time for excusable neglect, *Bowen v. Boles*, 258 F. Supp. 111 (D. C. N. D. W. Va. 1966); Rule 15 (b), determination of issue not raised by pleadings, *Hamilton v. Hunter*, 65 F. Supp. 319 (D. C. Kan. 1946). See also 1 W. Barron & A. Holtzoff, *Federal Practice and Procedure* (C. Wright ed.) § 131; Note, *Civil Discovery in Habeas Corpus*, 67 Col. L. Rev. 1296, 1299 (1967). The applicability to habeas corpus of the rules concerning joinder and class actions has engendered considerable debate. See *Mitchell v. Schoonfeld*, 285 F. Supp. 728 (D. C. Md. 1968); *Hill v. Nelson*, 272 F. Supp. 790 (D. C. N. D. Calif. 1967); *Adderly v. Wainwright*, 272 F. Supp. 530 (D. C. M. D. Fla. 1967). Cf. Note, *Multiparty Federal Habeas Corpus*, 81 Harv. L. Rev. 1492 (1968). The only issue before the Court in this case is the applicability to habeas corpus proceedings of those rules which deal with discovery. We intimate no view on whether the Federal Rules may be applicable with respect to other aspects of a habeas corpus proceeding.

matter of right, the broad discovery provisions which, even in ordinary civil litigation, were "one of the most significant innovations" of the new rules. *Hickman v. Taylor*, 329 U. S. 495, 500 (1947). Walker does not claim that there was any general discovery practice in habeas corpus proceedings prior to adoption of the Federal Rules of Civil Procedure.

In considering the intended application of the new rules to habeas corpus, it is illuminating to note that in 1938 the expansion of federal habeas corpus to its present scope was only in its early stages. *Mooney v. Holohan*, 294 U. S. 103 (1935); *Johnson v. Zerbst*, 304 U. S. 458 (1938); *Waley v. Johnston*, 316 U. S. 101 (1942). It was not until many years later that the federal courts considering a habeas corpus petition were held to be required in many cases to make an independent determination of the factual basis of claims that state convictions had violated the petitioner's federal constitutional rights. *Brown v. Allen*, 344 U. S. 443 (1953); *Townsend v. Sain*, 372 U. S. 293 (1963). In these circumstances it is readily understandable that, as indicated by the language and the scanty contemporary exegesis of Rule 81 (a)(2) which is available, the draftsmen of the rule did not contemplate that the discovery provisions of the rules would be applicable to habeas corpus proceedings.

It is also of some relevance that in 1948, when Congress enacted 28 U. S. C. § 2246 expressly referring to the right of parties in habeas corpus proceedings to propound written interrogatories, its legislation was limited to interrogatories for the purpose of obtaining evidence from affiants where affidavits were admitted in evidence. Again, the restricted scope of this legislation indicates that the adoption in 1938 of the Federal Rules of Civil Procedure was not intended to make available in habeas corpus proceedings the discovery provisions of those rules.



Indeed, it is difficult to believe that the draftsmen of the Rules or Congress would have applied the discovery rules without modification to habeas corpus proceedings because their specific provisions are ill-suited to the special problems and character of such proceedings. For example, Rule 33, which Walker here invoked, provides for written interrogatories to be served by any party upon any "adverse party." As the present case illustrates, this would usually mean that the prisoner's interrogatories must be directed to the warden although the warden would be unable to answer from personal knowledge questions relating to petitioner's arrest and trial. Presumably the warden could solicit answers from the appropriate officials and reply "under oath," as the rule requires; but the warden is clearly not the kind of "adversary party" contemplated by the discovery rules, and the result of their literal application would be to invoke a procedure which is circuitous, burdensome, and time-consuming.

The scope of interrogatories which may be served under Rule 33 also indicates the unsuitability of applying to habeas corpus provisions which were drafted without reference to its peculiar problems.

By reference to Rule 26 (b), the rule would give the prisoner a right to inquire into "any matter, not privileged, which is relevant to the subject matter involved in the pending action," whether admissible at trial or not. This rule has been generously construed to provide a great deal of latitude for discovery. See *Hickman v. Taylor, supra*, at 507; 2A W. Barron & A. Holtzoff, *supra*, § 646. Such a broad-ranging preliminary inquiry is neither necessary nor appropriate in the context of a habeas corpus proceeding.

Except for interrogatories to be served by the "plaintiff" within 10 days after the commendment of "the action," Rule 33 provides that the interrogatories may be

served without leave of court. The "adverse party" must then take the initiative to contest the interrogatories and a hearing in court on his objections is required. Unavoidably, unless there is a measure of responsibility in the originator of the proceeding, the "plaintiff" or petitioner, this procedure can be exceedingly burdensome and vexatious. The interrogatory procedure would be available to the prisoners themselves since most habeas petitions are prepared and filed by prisoners, generally without the guidance or restraint of members of the bar. For this reason, too, we conclude that the literal application of Rule 33 to habeas corpus proceedings would do violence to the efficient and effective administration of the Great Writ. The burden upon courts, prison officials, prosecutors, and police, which is necessarily and properly incident to the processing and adjudication of habeas corpus proceedings, would be vastly increased; and the benefit to prisoners would be counterbalanced by the delay which the elaborate discovery procedures would necessarily entail.

It is true that the availability of Rule 33 would provide prisoners with an instrument of discovery which could be activated on their own initiative, without prior court approval, and that this would be of considerable tactical advantage to them in the prosecution of their efforts to demonstrate such error in their trial as would result in their release. But despite the forceful and ingenious argument of Walker's counsel and *amicus curiae*,<sup>6</sup> this consideration cannot carry the day. It is a long march from this contention to a conclusion that the discovery provisions of the Federal Rules of Civil Pro-

---

<sup>6</sup> In our consideration of this case, we have been assisted greatly by the briefs of the *amici curiae*—the NAACP Legal Defense Fund and the National Office for the Rights of the Indigent in support of petitioner, and the United States and the State of New York in support of respondent.

cedure were intended to extend to habeas corpus proceedings. We have no power to rewrite the Rules by judicial interpretations. We have no power to decide that Rule 33 applies to habeas corpus proceedings unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding.

#### IV.

To conclude that the Federal Rules' discovery provisions do not apply completely and automatically by virtue of Rule 81 (a)(2) is not to say that there is no way in which a district court may, in an appropriate case, arrange for procedures which will allow development, for purposes of the hearing, of the facts relevant to disposition of a habeas corpus petition. Petitioners in habeas corpus proceedings, as the Congress and this Court have emphasized, and as we have discussed, *ante*, pp. 3-5, are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts. Congress has provided that once a petition for a writ of habeas corpus is filed, unless the court is of the opinion that the petitioner is not entitled to an order to show cause, the writ must be awarded "forthwith," or an order to show cause must be issued. 28 U. S. C. § 2243. Thereafter, if the court concludes that the petitioner is entitled to an evidentiary hearing, cf. *Townsend v. Sain*, *supra*; 28 U. S. C. § 2254, it shall order one to be held promptly. 28 U. S. C. § 2243.

Flexible provision is made for taking evidence by oral testimony, by deposition or upon affidavit and written interrogatory. 28 U. S. C. § 2246. Cf. §§ 2245, 2254 (e). The court shall "summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U. S. C. § 2243. But with respect to methods securing

facts where necessary to accomplish the objective of the proceedings Congress has been largely silent. Clearly, in these circumstances, the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Statute, 28 U. S. C. § 1651. This statute has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" *Price v. Johnston*, 334 U. S. 266, 282 (1948), quoting *Adams v. United States ex rel. McCann*, 317 U. S. 269, 273 (1942). It has been recognized that the courts may rely upon this statute in issuing orders appropriate to assist them in conducting factual inquiries. *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 609 (1911) (subpoenas *duces tecum*); *Bethlehem Shipbuilding Corp. v. NLRB*, 120 F. 2d 126, 127 (2d Cir. 1941) (order that certain documents be produced for the purpose of pretrial discovery). In *Price v. Johnson*, *supra*, this Court held explicitly that the purpose and function of the All-Writs section to supply the courts with the instruments needed to perform their duty, as prescribed by the Congress and the Constitution, provided only that such instruments are "agreeable" to the usages and principles of law, extends to habeas corpus proceedings.

At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require," either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect

to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in aid of [its] jurisdiction . . . and agreeable to the usages and principles of law." 28 U. S. C. § 1651.

We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy, which has its base in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles of law."

---

<sup>7</sup> MR. JUSTICE HARLAN, dissenting, agrees that district courts have power to require discovery when essential to render a habeas corpus proceeding effective. He dissents because he would substitute the judgment of this remote Court for that of the District Court, as to the need for authorizing discovery in this case. MR. JUSTICE HARLAN then expresses his views as to the desirability of formulating discovery rules under 28 U. S. C. § 2072, applicable to federal habeas and § 2255 proceedings. In our view, the desirability of launching rule-making proceedings does not and could not affect the decision in the present case.

In view of his remarks, however, we have concluded that we should express agreement with our Brother HARLAN as to the desirability of rule-making in this field. We repeat that it does not follow from this that district judges are without power to enter necessary orders in the absence of rules.

In fact, it is our view that the rule-making machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and § 2255 proceedings, on a comprehensive basis and not merely confined to discovery. The problems presented by these



Accordingly, we reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings in accordance with this opinion.

*Reversed and remanded.*

---

proceedings are materially different from those dealt with in the Federal Rules of Civil Procedures and the Federal Rules of Criminal Procedure, and reliance upon usage and the opaque language of Civil Rule 81 (a) (2) is transparently inadequate. In our view the results of a meticulous formulation and adoption of special rules for federal habeas corpus and § 2255 proceedings would promise much benefit.

# SUPREME COURT OF THE UNITED STATES

No. 199.—OCTOBER TERM, 1968.

George B. Harris, Judge of U. S. District Court for the Northern District of California, Petitioner, v. Louis S. Nelson, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
---	---

[March 24, 1969.]

MR. JUSTICE BLACK, dissenting.

I would affirm the Court of Appeals' holding in this case, *Wilson v. Harris*, 378 F. 2d 141, that 28 U. S. C. § 2246 does not authorize discovery in habeas corpus proceedings. Upon affirmance I would not go further and write what appears to me to be in effect an advisory opinion directing the trial court to formulate some kind of new legal system for discovery in this kind of case. Fully agreeing with the Court's statement that "We have no power to rewrite the Rules by judicial interpretations," I go further and doubt that we have power to direct lower courts to write new laws providing for discovery in habeas corpus cases. This is a complicated field of law-making and I think we should not enter this field in the absence of some valid delegation of legislative power by the Congress. Since I cannot agree that Congress has granted us such power, I am unable to go along with the Court's opinion.

There have been many complaints among members of the bar about many Court-made rules of procedure and I would venture the suggestion that in no field have the number of those complaints exceeded the complaints in this particular field of discovery. I regret that I cannot "assume," with the Court, that given blanket authority, "courts in the exercise of their dis-

cretion will [not] pursue or authorize pursuit of all allegations presented to them." This case makes me skeptical about such an assumption. Here Walker was convicted in a state court of having marijuana in his possession. After exhausting all state remedies he asked the federal courts to let him out of jail. He apparently did not allege his innocence, does not now do so, and this Court apparently does not now consider the question of guilt or innocence in this case. What he does allege is that the trial court made an error in admitting certain evidence against him. It is not alleged that the evidence was not relevant against him or that the verdict resting on that evidence was not a truthful, honest verdict. We must, therefore, assume that he was and is guilty of the crime of which he was convicted. See my dissent in *Kaufman v. United States*, — U. S. — (1969), decided today. What is relevant, however, and all that is alleged, is that the evidence used against him, presumably the marijuana, was found on his premises as the result of a search made after a statement by a person to a policeman, the statement the allegations now say "was not shown to have been reliable" and made by a person "who was in fact unreliable." It may be possible that a new trial over this issue can establish that the person telling the officer that marijuana could be found on Walker's premises was an "unreliable" person and that the statement he made was also "unreliable." But the fact remains that the marijuana was found where the unreliable person's unreliable statement told the officer it would be found. Consequently it appears to me that the present case against a defendant whose guilt has been proven to a jury beyond a reasonable doubt should not be taken as an appropriate one on which this Court lays the ground work for a new and vast judicial legislative rule-making program.

Perhaps it might not be considered amiss mildly to suggest that in cases like this, where records contain no question at all about guilt, that some convictions should at some time be treated as final and no longer subject to challenge, at least by collateral attack. Although I admit that *Aguilar v. Texas*, 378 U. S. 108 (1964), and *Spinelli v. United States*, — U. S. — (1969), go a long way, I had not previously thought that even these cases could support what the Court is doing in this case.

# SUPREME COURT OF THE UNITED STATES

No. 199.—OCTOBER TERM, 1968.

George B. Harris, Judge of U. S. District Court for the Northern District of California, Petitioner, v. Louis S. Nelson, Warden.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
---	---	---

[March, 24, 1969.]

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITE joins, dissenting.

I agree that neither Rule 33 of the Federal Rules of Civil Procedure nor any statute authorizes the interrogatories sought in this case. I further agree that district courts do have power to require discovery when essential to render a habeas corpus proceeding effective. But I would make it explicit that such power is narrow and should be exercised sparingly, and would not set the district courts "at large," as I fear today's opinion may be taken to do.

## I.

This case furnishes an apt illustration of the differences between my viewpoint and what seems to be that of the majority. As stated more fully in the Court's opinion, *ante*, at 1-2, petitioner claimed that marijuana admitted at his trial was seized incident to an arrest which was based upon information supplied by an unreliable informant. After the District Court had ordered an evidentiary hearing, petitioner directed to the respondent warden a series of interrogatories designed to establish the unreliability of the informant. The interrogatories asked whether the officer who arrested petitioner had made previous arrests or searches on the basis of infor-



mation given by the same informant; if so, whether such arrests or searches resulted in convictions; and whether the informant had ever supplied information which the officer considered unreliable.

It seems apparent that this discovery was not essential to an adequate habeas proceeding. All of the information sought was known to the arresting officer. Petitioner knew the officer's identity; in fact, the officer had testified at the preliminary hearing and at trial on the very issue of the informant's reliability. Hence, there is no reason to believe that all of the information could not have been obtained by calling the officer as a witness at the habeas hearing. Although I realize that the parties have not directed their arguments to this precise question, I am satisfied that on the face of things petitioner cannot possibly show that this discovery is essential to a fair proceeding. Accordingly, I would affirm outright the judgment of the Court of Appeals.<sup>1</sup>

---

<sup>1</sup> My Brother STEWART bases his dissent in this case upon my own dissenting opinion in *Kaufman v. United States*, post, at —, —, in which I have taken the position that in actions brought by federal prisoners under 28 U. S. C. § 2255 Fourth Amendment claims should be entertained only upon a showing of "special circumstances." I prefer to rest my disagreement with the result in this case upon other grounds, for two reasons. First, this case is not on all fours with *Kaufman*, since this was a federal habeas action by a state prisoner rather than an action by a federal prisoner under § 2255. The *Kaufman* question has not been briefed or argued in this case, and there may conceivably be significant distinctions between the two types of proceedings. See, e. g., Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378 (1964). Second, although this case happens, like *Kaufman*, to involve a search-and-seizure issue, the Court's reasoning here plainly applies to all claims cognizable on federal habeas corpus. Hence, it seems appropriate to rest my dissent upon broader grounds, which also appeal to my Brother WHITE.

## II.

The more troublesome aspect of the Court's opinion is its long-run implications. For it can be taken as suggesting that the best solution to the problem of discovery in habeas corpus proceedings is to permit each district court to devise "appropriate modes of procedure" on a case-by-case basis. As regards the immediate future, a case-by-case approach may be unavoidable, since there is at present no body of applicable discovery rules and the district courts must have power to order discovery which is essential to effective disposition of habeas applications. But I consider that from a broader standpoint the problem of habeas discovery should be dealt with not case by case but through exercise of our rule-making power. See 28 U. S. C. § 2072.

There are several reasons for believing that a case-by-case approach will be unsatisfactory in the long range. It seems to me that in fairness both to habeas petitioners and to their adversaries, the discovery procedures which are available in such actions should be uniform throughout the federal system and not dependent upon the varying "discovery attitudes" of particular district judges. If discovery procedures are developed case by case, there will at the least be a very long period during which procedures will differ from district to district. Even assuming that a coherent body of rules finally will emerge because of the unifying influence of appellate decisions, it is unlikely that the rules thus generated will be the best that could have been devised. Appellate courts, including this one, are imperfectly informed both about the extent of the need for additional discovery in habeas corpus and about the procedures best suited to meet those needs and to achieve prompt dispatch of habeas proceedings. They are, therefore, poorly situated to lay down

guidelines for the district courts. Moreover, discovery rules fashioned in the course of day-to-day adjudication are likely to suffer from the limitations which accompany that process.

Such considerations lead me to think that, in the longer view, the formulation of discovery rules can best be accomplished through use of the power which Congress has conferred upon us to establish general rules governing civil procedure in the federal district courts. By using this method of rule making, the advice of the Judicial Conference of the United States and its appropriate advisory committees could be obtained.<sup>2</sup> These bodies are well equipped to assess the dimensions of the discovery problem and devise apt solutions. Their deliberations would be free from the time pressures and piecemeal character of case-by-case adjudication. And the resulting rules would be uniform throughout the federal system.

My conviction that this would be the best course is strengthened by recollection of our decision in *Miner v. Atlas*, 363 U. S. 641 (1960), and the events which followed. In *Miner* we held that a District Court sitting in admiralty had no power to order the taking of an oral discovery deposition. Responding to a suggestion in our opinion, see 363 U. S., at 651, and to earlier stirrings at the bar, the Judicial Conference and the Advisory Committee on General Admiralty Rules swiftly proposed new Admiralty Rules authorizing certain additional kinds of discovery, including oral depositions. After approval by this Court and submission to Congress,

---

<sup>2</sup> For a brief account of the role played by these bodies in the making of civil rules, see Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 357-358 (1967).

as required by statute,<sup>3</sup> the new Admiralty Rules went into effect little more than a year after our decision.<sup>4</sup> There is no reason to think that the Judicial Conference and the advisory committees would not be equally cooperative in this instance.

For the reasons stated in Part I of this opinion, I would affirm the judgment of the Court of Appeals in this case.

---

<sup>3</sup> See 28 U. S. C. § 2072, which also specifies that the proposed rules shall not take effect for 90 days after they have been reported to Congress.

<sup>4</sup> See Admiralty Rules 30A-30G, 32, 32B-32D, which were either added or amended effective July 19, 1961.

# SUPREME COURT OF THE UNITED STATES

No. 199.—OCTOBER TERM, 1968.

George B. Harris, Judge of U. S. District Court for the Northern District of California, Petitioner, v. Louis S. Nelson, Warden.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
---	---	---

[March 24, 1969.]

MR. JUSTICE STEWART, dissenting.

I concur with most of what is said in the Court's opinion, but cannot concur in its judgment.

I wholly agree that Rule 33 is inapplicable to habeas corpus proceedings. Contrary to my Brother HARLAN, I further agree that federal judges in carrying out their duty to dispose of habeas corpus applications "as law and justice require," 28 U. S. C. § 2243, should not be inhibited by inflexibly formalized procedural rules. In getting at the facts in such cases, the district courts should be given wide leeway for "discretion to exercise their common sense." *Machibroda v. United States*, 368 U. S. 487, 495.\*

However, for the reasons stated in MR. JUSTICE HARLAN's dissenting opinion today in *Kaufman v. United States*, *ante*, p. —, which I have joined, I would affirm the judgment in the present case.

---

\*The *Machibroda* case arose under 28 U. S. C. § 2255, the statutory counterpart of habeas corpus. In the circumstances there presented, we pointed out that "many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail where the petitioner was confined, the mail records of the penitentiary to which he was sent, and other such sources." 368 U. S., at 495.